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Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
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No. 601.

SOUTHERN RAILWAY COMPANY ET AL.,

Appellants,

vs.

H. H. TIFT ET AL.,

Appellees.

Statement, Brief and Argument in Behalf of Appellees.

CONTENTS.

		PAGES
I	Statement of Case	1-26
	(a) Order of Procedure	5- 8
	(b) Final Decree	8-12
	(c) Proceedings on Appeal	13-14
	(d) Findings of Fact by the Commission	14-23
	(e) Conclusions of the Commission	23-25
	(f) Findings of the Court	26
II	Brief on Propositions of Law	27-60
III	Argument of Facts and Authorities	60-111

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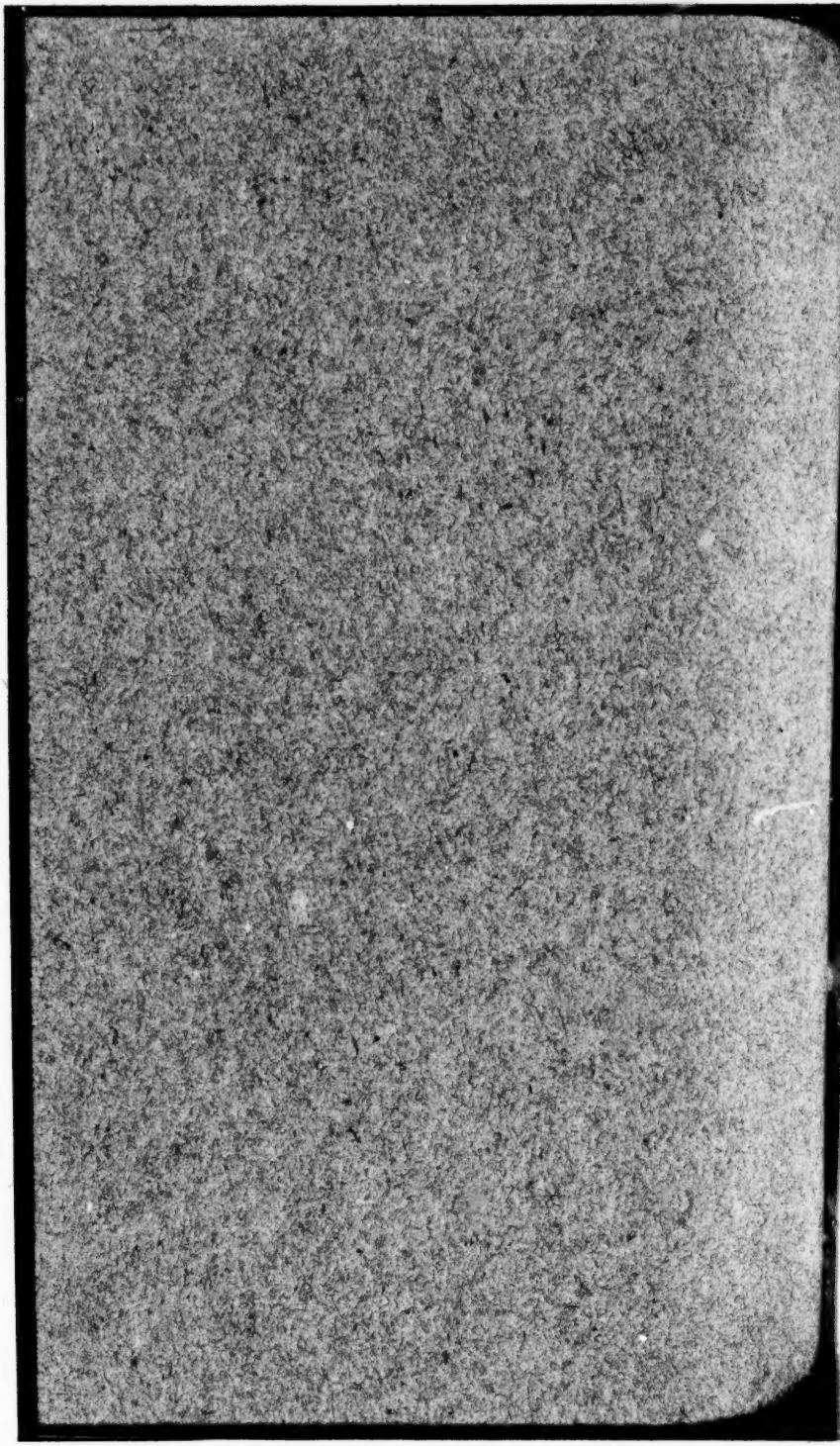

BOUND CLOSE IN CENTER

BOOK TOO LARGE FOR FILM

CHRONOLOGICAL INDEX.

Statement.

	PAGE
The fundamental question	1
The secondary question	2
Original bill filed April 14, 1903	2
Amended bill filed May 8, 1903	3
Demurrer to bill as amended, May 12, 1903	3
Answer of Southeastern Freight Association to amended bill, May 12, 1903	3
Demurrer argued May 6, 1903	3
Responses to rule to show cause, May 16, 1903	3
Interlocutory decree, May 16, 1903	3
Opinion on demurrer and injunction	3, 4
Rates fixed and in effect June 22, 1903	4
Petition to Interstate Commerce Commission filed June 23, 1903	4, 5
Application to Circuit Court for injunction	5
Response to application for injunction	5
Separate response of Southeastern Freight Association	5
Order denying application for restraining order —respondents' stipulation	5
Hearing before Interstate Commerce Commission	6
Order of Commission adjudging rates unreasonable	6
Petition to Circuit Court for enforcement of Commission's order	6
Order to show cause on petition	6, 7
Answers to said petition	6, 7
Supplemental bill filed April 27, 1905	7
Demurrer to supplemental bill	7
Stipulations of counsel	7, 8
Additional evidence admitted	8
Final decree	9–11

NG – POSSIBLE BLURRED PAGES

	PAGE
Petition for appeal and supersedeas	11-12
Order on petition for supersedeas	12-13
Appeal and supersedeas bonds, conditions of	13
Opinion upon final hearing	13
Decree of affirmance in Circuit Court of Appeals	13
Findings of fact by the Commission	14-23
Conclusions of Commission	23-25
Decision and order of the Commission	25-26
Findings of the Circuit Court	26

Brief.

I. Power of Commission; jurisdiction of Circuit Court	27
II. Act to Regulate Commerce; jurisdiction of Federal Courts under	30
III. Federal question; diversity of citizenship; jurisdiction of Circuit Court	33
IV. Circuit Court; general equity jurisdiction of; Act to Regulate Commerce, § 22	35
V. Evidence; weight of; Court will not consider	37
VI. Rate; reasonableness of; judicial question	41
VII. Unreasonable rates; Interstate Commerce Act adopts common law principles; prohibited	42
VIII. Interstate Commerce Commission; Circuit Court; power to adjudge rates unreasonable; injunction	43
IX. Remunerative rates; fair compensation; advance unreasonable	46
X. Remunerative rates; advance, in to increase dividends not justifiable	47
XI. Contentions of defendants disposed of as matter of fact by findings of Commission and Circuit Court	49
XII. Rates reasonable; no legal standard of	50
XIII. Combination in restraint of trade; advance of rates by, unreasonable; absence of competition	52

PY BOUND CLOSE IN CENTER BOOK TOO LARGE FOR FILM

PAGE

XIV. Georgia Saw Mill Association not combination in restraint of trade; not party plaintiff; question immaterial 56
XV. Stipulations by appellants; estoppel; waiver 57

Argument.

FIRST.—Suit properly brought; jurisdiction... 60
SECOND.—Primary finding by Commission; correctness of; proper procedure adopted... 63
THIRD.—Advance in rate; combination among carriers; competition eliminated..... 65
FOURTH.—Reasonable compensation; may not be advanced to increase revenue..... 75
FIFTH.—Selected points; rate between, does not justify advance..... 89
SIXTH.—Argument from self-interest of carriers; fallacy of..... 94
SEVENTH.—Cost of service; increase of, does not equal increase in cost of production of lumber..... 96
EIGHTH.—Particular rate; reasonableness of; does not depend on entire schedule..... 99
NINTH.—Reasonableness of rates; expert opinion not controlling; interested experts..... 103
TENTH.—Competitive conditions; no change in; an advance not justified by..... 104
ELEVENTH.—Former rate; advance not restoration of..... 105
TWELFTH.—Operating expenses; increase of, will not justify advance..... 108
THIRTEENTH.—Intermediate roads; proportion of through rate to, does not justify advance. 109

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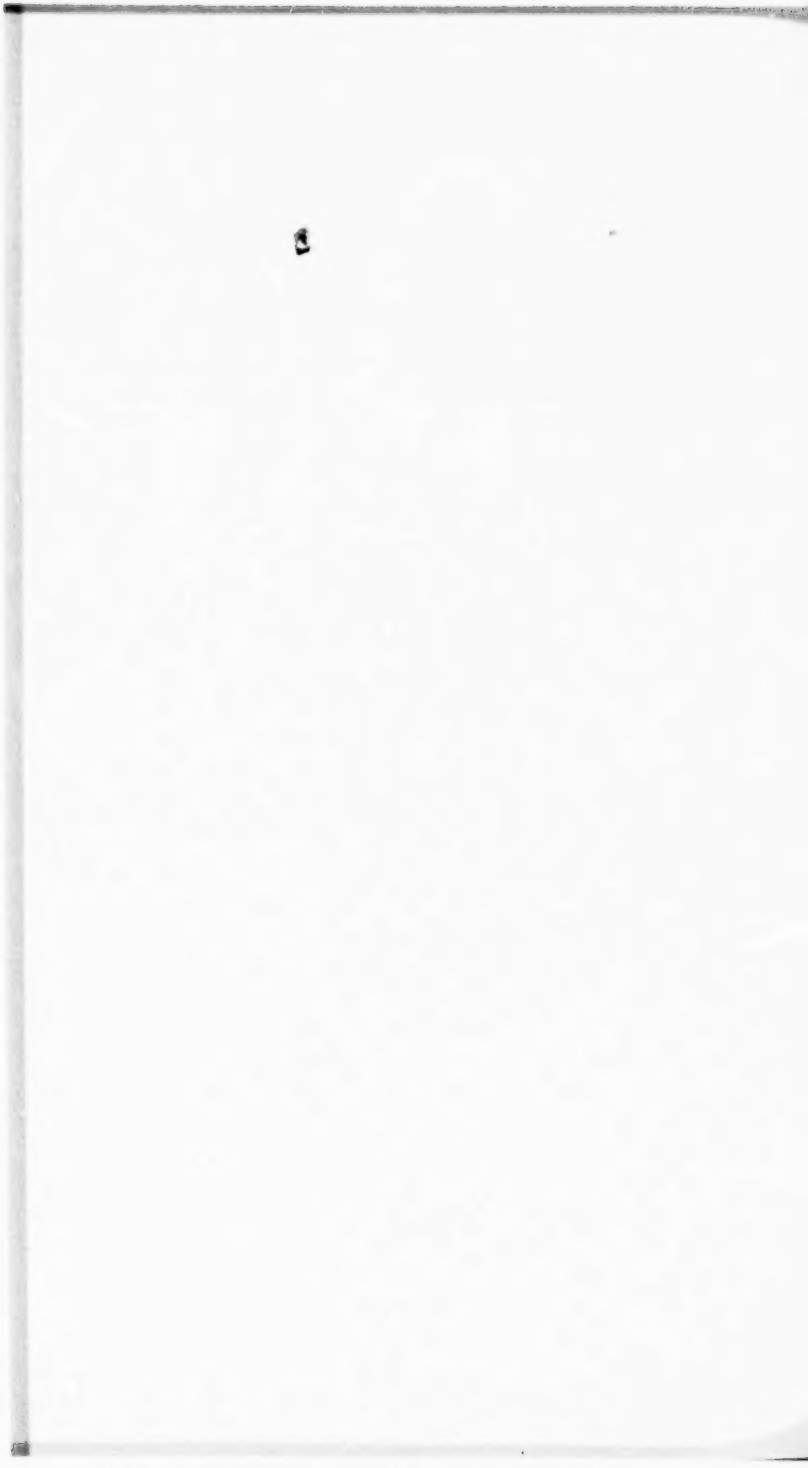

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In the Supreme Court of the United States,

OCTOBER TERM, 1906.

SOUTHERN RAILWAY COMPANY *et al.*, Appellants, vs. H. H. TIFT *et al.*, Appellees.	No. 601.

STATEMENT, BRIEF AND ARGUMENT IN BEHALF OF THE APPELLEES.

Statement of the Case.

The underlying question involved in this case is as to the reasonableness of an advance in freight rates of two cents per hundred pounds (over profitable rates previously in force) on yellow pine lumber from Georgia points to Ohio River destinations, on lumber shipped in car load lots, whether shipped locally to said Ohio River points or shipped beyond.

Tr., Pt. II., pp. 1014–1017, Report and Opinion of Interstate Com. Com.

Also: 10 Interstate Com. Rep., 548 *et seq.*

Tr., Pt. III., pp. 1059, 1060, 1061–1063.

Tift *v.* So. Ry. Co., 123 Fed. Rep., 789, 790.

Tift *v.* So. Ry. Co., 138 U. S., 753, 754.

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The secondary but equally important question is whether such advance was a violation of the Sher-Anti-Trust Act because made through an unlawful combination in restraint of trade and commerce between the States and in suppression of competition between competing carriers by reason of an agreement among them, through the agency of the Southeastern Freight Association, to make such advance in rates over *all* competing lines of railway acting under the control of said Association.

Tr., Pt. I., pp. 29, 30; fols. 66, 67; Amended Bill, paragraphs "Fourth" and "Fifth."
Tr., Pt. II., pp. 1014–1015.
Tr., Pt. III., pp. 1207–1209; fols. 676–679.

All other questions are but subsidiary and technical, and while they may prove important, are not fundamental.

In view of the very recent decision of this Court in the case of Texas & Pacific Railway Co. *vs.* Abilene Cotton Oil Company, 204 U. S., 426, it seems that many of the contentions of the appellants in the court below are swept away, and the result of that decision is to remit them to the discussion of the fundamental questions above stated, and to technical objections to *the order of procedure in*—rather than to the jurisdiction of—the tribunals below.

The history of this controversy, both in the United States Circuit Court and before the Interstate Commerce Commission—by which body the unreasonableness of the rates was first determined—is as follows:

On April 14, 1903, complainants filed their original bill (Tr., Pt. I., p. 17), and the Court, upon the filing of the bill, granted a temporary restraining order directing the defendants to appear and show cause why an injunction should not issue (Tr., Pt. I., p. 28).

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On May 8th, before the defendants had filed any demurrer, plea or answer, complainants, by leave of Court, filed an amendment to their original bill of complaint (Tr., Pt. I., pp. 29, 30).

On May 12, the defendants filed their demurrer to the bill as amended (Tr., Pt. I., p. 31). On the same day the Southeastern Freight Association filed an answer to the bill as amended, making discovery of the facts as to the organization and actions of the association in the matter of advancing the rates (Tr., Pt., I., pp. 60-67, and exhibits). On May 16, the demurrer was argued, and at the same time the defendants made response to the rule to show cause why an injunction should not issue (Tr., Pt. I., pp. 106-134).

On May 16 an interlocutory decree was entered overruling the demurrer, sustaining the jurisdiction of the Court over the subject-matter of the bill, but dissolving the temporary injunction and containing the following directory clause:

"In case the respondents shall enforce the rates complained of and the complainants shall make proper application to the Interstate Commerce Commission to redress their alleged grievances, the Court will entertain a renewed application on the record as made and such proper additions thereto as may be proposed by either party, enjoining the enforcement of such rates pending the investigation of the Commission, unless otherwise dissolved, and on presentation to the Court of the report of the Commission, such other action be taken as will be conformable to law and the principles of equity."

Tr., Pt. I., p. 204.

This interlocutory decree was based upon an opinion read and filed by Judge Speer upon the same day (Tr., Pt. I., pp. 201-203).

In the course of this opinion Judge Speer recited the status, stipulations and conduct of the parties before the Court as justifying a slight departure,

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if any such there was, from the logical order of procedure as between the two tribunals, saying:

"These rates are not, therefore, effective, and it is presumable that under the circumstances the Commission will take no action until the rates are actually put into operation. It would doubtless have been better practice if the complainants here had first made application to the Commission to redress the grievances of which they complain, and then, pending that application, to have invoked the powers of this Court to restrain the alleged wrong until the Commission could have acted. They have gone forward here, however, and *with the co-operation of the defendants and at their express instance*, the case has been heard, not on the demurrer to the jurisdiction of the Court separately, but on the demurrers, answers and affidavits, with large expense to the parties and much labor to all concerned. The case is fully before the Court."

Tr., Pt. I., p. 202.

The rates complained of in the bill and amended bill and in the petition filed, pursuant to the Court's direction, before the Interstate Commerce Commission, were duly fixed by the carriers in the manner and form prescribed by the Act to Regulate Commerce, and went into effect, after due posting and publication, on June 22, 1903 (Tr., Pt. I., p. 256, Par. IV. of Pet.).

Thereupon, on June 23, 1903, the day after the advanced rates took effect, complainants, *as petitioners*, filed their petition against defendants, *as respondents*, before the Interstate Commerce Commission, invoking the action and determination of the Commission as to the illegality and unreasonableness of the advanced rates, charging also that the Southeastern Freight Association was an unlawful combination in restraint of trade and commerce between the States, and that the advance in rates

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had been made in pursuance of such unlawful combination and in suppression of competition between respondent Railway Companies as competing carriers (Tr., Pt. I., pp. 254 260).

Thereupon—the Interstate Commerce Commission having no power to issue an injunction or restraining order forbidding the collection of the advanced rates—the complainants filed their application in the nature of a petition in the Circuit Court reciting the proceedings that had been had; the fact that the advanced rates were in effect; the pendency of the proceedings before the Interstate Commerce Commission; and praying the Circuit Court for an interlocutory order to enjoin the defendants from continuing to exact and enforce the advance in rates pending the investigation before the Interstate Commerce Commission; and from the collection of such advance in rates (Tr., Pt. I., pp. 251–253).

On this application an order to show cause was issued (Tr., Pt. I., pp. 260–262). Defendants at once made response to this application and order, showing specifically in such response the facts regarding the making and putting into effect of the advanced rates and *admitting all the facts set forth in the application*. This response was an answer upon the merits to the application (Tr., Pt. I., pp. 263–265).

Samuel F. Parrott, Chairman of the Southeastern Freight Association, filed a separate response to the application, denying that said Association is an unlawful combination in restraint of trade (Tr., Pt. I., pp. 266, 267).

On July 16, 1903, Judge Speer denied this application for a temporary restraining order *upon respondent's stipulation in open court to make restitution of sums exacted under the advanced rates if the advance should be adjudged illegal*, it appearing that the matter of the reasonableness or unreasonableness of the rate and the legality of the action by which the rate was established would shortly be determined by the Interstate Commerce Commission, or put in a status for final determination by

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the Court (Tr., Pt. I., pp. 268–276). And thereafter, in October, 1903, the Interstate Commerce Commission sat at Atlanta and took proof upon the merits of the controversy between the parties, under the pleadings and proceedings before the Commission, and under date of February 7, 1905, filed their "Report and Opinion," specifically finding the facts proven by the evidence before them, and stating their conclusions thereon (Tr., Pt. II., pp. 1014–1055). On the same day an order was entered by the Commission, declaring the advance in rates complained of and the rates resulting therefrom to be excessive, unreasonable and unjust and in violation of the Act to Regulate Commerce, and commanding the defendants, on or before April 1, 1905, to cease and desist from further maintaining or enforcing said unlawful advance or the unlawful rates resulting therefrom (Tr., Pt. II., pp. 1057–1058).

Thereafter, on March 17, 1905, complainants, as petitioners, presented their petition to the Circuit Court, setting out the proceedings before the Interstate Commerce Commission, stating the substance of the findings and conclusions of the Commission, and presenting and filing with their petition a certified copy of the "Report and Opinion" of the Commission and the order based thereon, and praying an injunction enjoining the enforcement of the advanced rates and the collection thereof (Tr., Pt. I., pp. 278–280).

On this petition an order to show cause, returnable April 3, 1905, was entered (Tr., Pt. I., p. 280). No hearing was in fact had on this order to show cause until June, 1905. On June 3rd, 1905, respondents filed their joint and several answer to the above named petition, admitting the allegations of fact as to the action and proceedings of the Interstate Commerce Commission and the order of the Commission, and making defense that the findings of fact by the Interstate Commerce Commission were not supported by and were contrary to the

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great weight of the evidence before the Commission, and concluding with the allegation: "Respondents are advised and insist that the conclusions of law contained in said Report and Opinion are erroneous; that said Report and Opinion and order are illegal and void and should not be enforced by this Honorable Court" (Tr., Pt. III., pp. 1066–1070).

This answer was formal in character, being verified by every respondent, and was *the only pleading interposed to said petition, no demurrer thereto being filed* (Tr., Pt. III., pp. 1070–1075).

The Southeastern Freight Association answered separately (Tr., Pt. III., p. 1065).

In the meantime complainants—pursuing their suit in equity—filed their *supplemental bill* on April 27, 1905, the foregoing petition to enforce the order of the Commission being then on file, as hereinbefore shown (Tr., Pt. III., pp. 1066–1067).

This supplemental bill, in addition to a recital of the proceedings had before the Interstate Commerce Commission, especially as to the application made by defendants through their counsel in open court, "that they would promptly refund to your orators all sums paid by them for the transportation of lumber," &c. (Tr., Pt. III., p. 1062), the whole purpose of this supplemental bill was to obtain restitution and have a reference to a master to ascertain the amount to be repaid (Tr., Pt. III., pp. 1062–1063. Prayer to Supplemental Bill).

To the supplemental bill a demurrer was interposed by the defendants (Tr., Pt. III., pp. 1222–1223).

While the fact does not specifically appear in the record, the counsel for the defendants (appellants) consented on the final hearing, as the record does show, that the Court might in the final decree on the original and amended bill grant any relief that could be properly granted under the supplemental bill, and the demurrer to the supplemental bill was never argued by counsel or ruled upon by the Court (Tr., Pt. III., p. 1228).

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Before the final hearing in the Circuit Court it was stipulated as follows:

"In this case it is stipulated and agreed by counsel for complainants and defendants as of record that the testimony, including the exhibits thereto, taken before the Interstate Commerce Commission in the case of H. H. Tift *et al. vs.* Southern Railway Company *et al.*, and which is to be printed, may be filed in this case and in this Court, and have the same force and effect as if the same had been taken in this case and in this Court subject only to objections by either party on the ground of relevancy. All objections for form being expressly waived.

"This stipulation, however, is not to prevent either party from applying to the Court for leave to take any additional testimony that the Court may think needful to enable it to form a just judgment in this case."

Tr., Pt. III., p. 1059.

And on the final hearing additional evidence in the form of affidavits was submitted by both complainants and defendants, with the agreement that such testimony should be treated as though regularly taken under the rules in equity (Tr., Pt. III., p. 1208; Opinion of Speer, *J.*).

It was expressly agreed that the hearing upon which the opinion just referred to was rendered should stand for and be the hearing for final decree in equity (Tr., Pt. III., p. 1208; Opinion of Speer, *J.*).

Thereupon the case was submitted to the Court, taken under advisement and final decree entered on July 8, 1905 (Tr., Pt. III., pp. 1227–1230). The final decree so entered was as follows:

Final Decree.

"This cause came on to be heard at this term, on the pleadings and proofs submitted, and was argued by counsel for the respective parties.

"At the hearing of the cause under the rule issued to show cause why an injunction should not be granted pending an investigation by the Interstate

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Commerce Commission of the reasonableness of the rates complained of, counsel for the respondents stipulated *in judicio* that should the contention of the complainants prevail, and the Court should decree the advance in rates complained of to be unreasonable and excessive, the respondents would promptly repay to the complainants all such sums paid by them in excess of the rates obtaining prior to the filing of the original bill.

" The cause being at issue upon the pleadings in this Court, further proceedings were suspended pending an investigation and report of the Interstate Commerce Commission.

" Subsequently a certified copy of the opinion, report and order of the said Commission was duly filed in this Court, and there was also filed a copy of the evidence taken before and heard by the Commission, under a stipulation of counsel that such evidence so filed should have the same force and effect as if the same had been taken in this Court and in this cause.

" On the hearing of the cause, beginning on the 20th day of June, 1905, and continuing through the 22d day of June, 1905, additional evidence in behalf of the respective parties was offered and admitted, and counsel consented in open court that the cause should be fully heard upon all the issues involved, and final decree rendered therein, and also agreed that should the contentions of the complainants prevail, it would be competent for the Court to take such action as was consonant with the stipulation made at Mount Airy, and the ruling of the Court based thereon, without other or further pleadings.

" Upon conclusion of the hearing the Court took the cause under advisement, and after full consideration of all the pleadings, proof and argument of counsel, handed down his opinion on the 29th day of June, 1905, sustaining the contentions [of the complainants].

" The Court being now fully advised in the prem-

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ises, thereupon and in consideration thereof, it is considered, ordered, adjudged and decreed, as follows, to wit:

"FIRST.—That the advance on rates of lumber complained of in the bill, and made effective by defendant railway companies, on June 22, 1903, from lumber shipping points within the State of Georgia, to Cincinnati, Louisville, Evansville, Cairo and other points on the Ohio river, commonly designated as Ohio river points or crossings, was and is excessive, unreasonable and unjust, and in violation of the provisions of the act of Congress, known as the act to regulate commerce, and the amendments thereto, and that the rates and charges resulting from said advance are likewise excessive, unreasonable and unjust and in violation of the act to regulate commerce.

"SECOND.—That an injunction do issue directed to the respondents, Southern Railway Company, Central of Georgia Railway Company, Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, Nashville, Chattanooga and St. Louis Railway, Seaboard Air Line Railway, Georgia Southern and Florida Railway Company, Macon and Birmingham Railway Company, their officers, agents and servants, commanding and strictly enjoining them, jointly and severally, to discontinue and wholly desist from maintaining or enforcing the said advance in rates, made effective on the 22d day of June, 1903, or either of them, in so far as they apply to shipments of lumber from points in Georgia, to Ohio river destinations and points basing thereon.

"THIRD.—That an order be taken referring to the standing master of this Court, J. N. Tally, Esq., the pleadings and evidence in this cause, with instructions to ascertain the sum total of the increase in rates paid by each of the complainants and

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other members of the Georgia Sawmill Association to either or all of the defendant companies since the rate went into effect, and to the end of the litigation, and report such amount to the Court *in order that, pursuant to the stipulation made by the respondents in open Court in case the complainants prevailed, decree of restitution may be made.*

"FOURTH.—That the injunction herein granted be and it is hereby suspended for ten days from June 29, 1905, that is to say, until and including July 8, 1905, which time is allowed the respondents within which to apply for a supersedeas, should they or either of them desire to enter an appeal.

"FIFTH.—That the costs of the suit to be taxed by the Clerk be and are hereby awarded against the respondents.

"SIXTH.—All matters and things not herein expressly adjudged are reserved by the Court and any party to this proceeding may apply to the Court for further orders and directions at the foot of this decree."

Tr., Pt. III., pp. 1227–1229.

From this decree defendants prayed an appeal by petition in the usual form (Tr., Pt. III., pp. 1244–1245); then filed their assignment of errors to the Circuit Court of Appeals (Tr., Pt. III., pp. 1230–1242), and at the same time petitioned the Court for leave to give bond and supersede the injunction order, offering to give such bond "payable to the United States of America or such other payee as the Court may direct" (Tr., Pt. III., p. 1241).

In the same petition for supersedeas it was provided that the bond should be "conditioned for the prompt payment by your petitioners *to such persons or person as may be legally entitled thereto*, such amounts as your petitioners or any of them may

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collect pending said appeal over and above the reduced rates ordered by said decree, or said bond may be conditioned in such other manner as this Honorable Court may deem just and equitable to protect the interests of shippers and consignees pending said appeal."

Tr., Pt. III., p. 1241.

The Court granted the petition for a supersedeas upon the giving of a bond *for the protection of the interests of all shippers*, and the order granting the supersedeas contained the following clause:

"It is ordered, adjudged and decreed, by the Court, that pending said appeal, said defendants keep an accurate account of each and every shipment of yellow pine lumber made from any of the lumber shipping points within the State of Georgia to Cincinnati, Louisville, Evansville, Cairo and other points on the Ohio River, commonly designated as Ohio river points or crossings, and to points basing on said Ohio River points and crossings, which accounts shall show the dates of shipment, the names of consignors and consignees, the weight of lumber carried and the rate of freight charged, and make reports thereof to this Court once every three months pending said appeal, and that defendants execute bond with sufficient surety to be approved by the Court payable to the United States of America, for the benefit of whom it may concern, in the penalty of ($500,000) five hundred thousand dollars, conditioned that if said defendants fail to prosecute said appeal to effect they will promptly pay to said person or persons as may be legally entitled thereto such amounts as said defendants or any of them may collect, pending said appeal, from such person or persons for the transportation of yellow pine lumber from any of the lumber shipping points within the State of Georgia to Cincinnati, Louisville, Evansville, Cairo and other points on the Ohio river, commonly designated as Ohio river points

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and crossings, and to points basing thereon, over and above the reduced rates from said points of shipment to said points of destination as orderd by said decree."

Tr., Pt. III., p. 1243.

The appeal and special supersedeas bonds were then given and the case removed to the United States Circuit Court of Appeals for the Fifth Circuit (Tr., Pt. III., pp. 1246-1247; 1251-1253.) The special supersedeas bond conformed to the aforesaid petition for supersedeas and the order thereon. It was made payable to the United States of America "*for the benefit of whom it may concern*," and the condition of the bond was that " in the event that the appellants fail to prosecute said appeal to effect they will promptly pay to such person or persons as may be legally entitled thereto such amount as said defendants, or any of them, may collect, pending said appeal from such person or persons, for the transportation of yellow pine lumber, from any of the lumber shipping points within the State of Georgia, to Cincinnati, Louisville, Evansville, Cairo, and other points on the Ohio River, commonly designated as Ohio River points or crossings, and to points basing thereon, over and above the reduced rates from said points of shipment to said points of destination as ordered in said decree, then this obligation shall be void, otherwise the same shall remain in full force and virtue."

Tr., Pt. III., p. 1252.

Upon the final hearing in the Circuit Court Judge Speer delivered a careful and elaborate opinion in this case which appears in the Transcript and in the Federal Reporter (Tr., Pt. III., pp. 1202 1221; Tift *v.* Southern Ry,, 138 Fed. Rep., 753.)

In the Circuit Court of Appeals the case was heard upon appeal before Judges Pardee, McCormick and Shelby, and affirmed without an opinion (Tr., Pt. III., p. 1258).

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The case was then brought to this Court in due course, numerous errors being assigned by the appellants (Tr., Pt. III., pp. 1262–1270.)

The Facts on the Merits.

What questions, if any, will be argued by appellants' counsel, based upon matters in relation to the technical procedure in this cause, we cannot determine in advance of the filing of their brief. In the court below the learned counsel for the appellants discussed but two questions in his elaborate brief: (1) That the increase in rate is not in fact unreasonable, and (2) that the Southeastern Freight Association is not an illegal combination in restraint of interstate trade.

The facts established by the evidence upon both these points were found by the Interstate Commerce Commission and also by the trial Court, and upon these findings of fact the conclusions of the Commission and the decree of the Circuit Court were based. Therefore such findings of fact become material, if not controlling, upon this appeal. They may be summarized from the record as follows:

Findings of Fact by the Commission:

1. The difference of 2 cents per hundred pounds in the lumber rates from Georgia points was originally promulgated by the defendants to take effect April 15, 1903, and would have become operative at that date but for a temporary injunction or restraining order granted April 14, 1903, by the Circuit Court of the United States for the Southern District of Georgia in the case before that Court of the complainants herein against the defendants herein.

The Circuit Court subsequently dissolved the temporary injunction and "withheld further judicial action until apprised" of the decision of the Commission in the present proceeding.

On the 22d of June, 1903, the defendant railways,

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after due notice, put in force the advanced rates on shipments from Georgia points as originally proposed.

The advance was made April 15, 1903, from both the territory West of the Mississippi, composed of Louisiana West of that river, Arkansas and Texas, and the territory east of the river, composed of East Louisiana, Mississippi, Alabama and Florida, and would have been enforced at the same date from Georgia but for the delay caused by the temporary injunction above mentioned. The advance was "intended to be simultaneous all along the line, and was made in fact, though not expressly, by agreement between the roads, including the defendants, serving the different lumber producing districts. A number of meetings were held and consultations had between the representatives of the roads, which resulted finally in the promulgation of the advance. The lumber manufacturers in all those territories compete for business largely in the same markets, and the increase of rates was understood to be impracticable or inadvisable unless made from all the lumber producing territories, and consequently there was a concurrence or agreement between the roads before the advance was finally determined upon and made effective. Defendant the Southern Railway Company appears to have taken the initiative in this matter."

The rates on lumber from shipping points in Georgia to many destinations beyond the Ohio River are based on the rate to Cairo, Illinois, the railway companies beyond the river receiving their full local rates from Cairo to destination, but leaving the remainder to be divided among the railway companies performing the service south of the river (Tr., Pt. II., pp. 1020–1022).

2. The shipping stations in Georgia are divided into groups or rate bases with slightly different rates to Ohio River crossings (Tr., Pt. II., p. 1022).

Rates from the lumber producing territory in

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Arkansas, Louisiana, Mississippi, and part of Alabama, are blanket rates, being the same from all shipping points to the same destinations (Tr., Pt. II., p. 1023).

The rates from the lumber producing territory in Georgia (excepting a small territory which produces comparatively little lumber) are higher than from Louisiana, Arkansas, Mississippi and Alabama (Tr., Pt. II., p. 1024).

3. There are divisions of the rates south of the Ohio between what are termed the "originating roads" on which the lumber is principally manufactured and the roads intermediate between those originating roads and the Ohio River crossings. The amounts or divisions allowed the originating roads are large in proportion to the lengths of the hauls made by them and in proportion to the balances of rates left for the intermediate roads. For example, the Southern Railway allows the lines south of Macon from 5½ to 7½ cents out of the rate to the Ohio River. This leaves as the proportion of the Southern Railway out of the 16-cent rate from Group 2 to Cairo from 8½ to 10½ cents, which yields a comparatively small rate per ton per mile. The rate per ton per mile, however, under the total rate to the river, which is the rate the shipper has to pay, is materially higher. The advance of two cents complained of in this case goes to the intermediate roads north of Macon, Albany and Montgomery, and none of it to the originating roads or to roads beyond the river.

Tr., Pt. II., p. 1025.

4. The rates from Georgia shipping points have been increased so that the rate to Cairo, Evansville, Louisville and Cincinnati is three cents a hundred pounds higher than it was in 1899. As compared with 1891 the rate to Cairo is only one cent less a hundred pounds, while the rate to Evansville is two cents higher and the rate to Louisville is one cent

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higher. The rate to Cairo, which in 1891 was 17 cents, was reduced to 13 cents on May 17, 1894. This rate remained in force for five years, until, September 8, 1899, it was increased to 14 cents. On June 22, 1903, it was increased to 16 cents. The rates now in force are higher than they have been since 1891 (Tr., Pt. II., p. 1026).

The average distance from Georgia shipping points to Cincinnati is less than from Mississippi points. The rates, however, from Georgia to Cincinnati as well as to the other Ohio river crossings, are higher than from Mississippi, Alabama, Louisiana and Arkansas (Tr., Pt. II., p. 1027).

5. After the advance in the rates from Georgia points there was a material falling off in shipments of lumber from Georgia points to Ohio river destinations and beyond. This decrease was due in part to a smaller demand, and in part to the advance in rate (Tr., Pt. II., pp. 1027–1028).

The lumber shipped west is for the most part low grade, the higher grades generally going east. Shipments to the east have increased, notwithstanding the falling off in western shipments (Tr., Pt. II., p. 1028).

6. The rate is the same on all grades of lumber, being as high on low-grade lumber of comparatively small value as on high-priced, high-grade lumber. On many low-grade classes of lumber shipped from Georgia to the West the freight charges exceed the value at the mill (Tr., Pt. II , p. 1029).

On no other article of as much value and of as great utility as lumber do the freight charges exceed the price at the point of shipment (Tr., Pt. II., p. 1030).

7. There has been no material increase in the market price of low-grade lumber since 1892. Prices have varied, in some cases being higher, but the

– POSSIBLE BLURRED PAGES

average increase has not been material (Tr., Pt. II., pp. 1030–1031).

8. The mill men have been unable to add the advance in the rate to the price at the mills (Tr., Pt. II., p. 1031). That price has decreased since the advance in rate, from 50 cents to $1.50 per thousand feet.

The average mill price on all classes of lumber is from $11 to $12 per thousand feet and the cost of manufacturing the lumber, including stumpage (which is the standing timber exclusive of land) and loading on the cars is from $7.50 to $8 per thousand feet. It does not appear that this includes insurance, interest on investment and depreciation of property (Tr., Pt. II., p. 1032).

The lumber business, while it lasts, is fairly but not exceptionally remunerative (Tr., Pt. II., p. 1033). After the lumber is cut from the land the equipment becomes practically worthless. The lumber machinery, except the engines, is not adapted to other purposes and second-hand engines can be sold for very little. Consequently lumber-mill men in their business must anticipate a time when a large part of their equipment will become worthless. It is estimated that in ten years seven-eighths of the largest sawmills in Georgia will have to go out of business on account of the exhaustion of the timber. After the lumber is cut off some of the lands become available for agricultural purposes. When thus used they supply a population that furnishes freight to the railroads (Tr., Pt. II., p. 1033).

9. The lumber business has been an important factor in building up and sustaining many of the railroads in Georgia. If deprived of this business some of the railroads would find it difficult to exist in a solvent condition (Tr., Pt. II., p. 1033).

It is also true that the roads have been essential to the lumber business, and it has been their policy

BOUND CLOSE IN CENTER BOOK TOO LARGE FOR FILMIN

to encourage and assist in its development with the view of increasing their own revenue.

The tonnage of lumber hauled by the defendants is very large, both actually and in proportion to that of other commodities of general use and necessity.

The tonnage of lumber transported by the defendants during the years 1901, 1902 and 1903 was greater than that of any commodity hauled, except bituminous coal. It is many times greater than the tonnage of the principal products of Georgia and the South, such as cotton, fruits and vegetables, naval stores, etc. In 1903 the tonnage of lumber hauled by the defendants was 9,808,463 tons, while the next highest tonnage was grain, amounting to 3,082,143 tons. Cotton represented 1,274,727 tons; fruits and vegetables 883,458 tons; and naval stores 681,863 tons. The tonnage of lumber in 1903 was nearly fifty per cent. greater than in 1901 (Tr., Pt. II., p. 1034).

The increase of two cents a hundred pounds in the rate represented approximately $132,000 a year in the freights, based on the tonnage moving at the time of the advance. This is equivalent to 66 cents a thousand feet (Tr., Pt. II., p. 1035).

10. The operating expenses of the defendant railway companies have increased from year to year, due for the most part to the constant growth or enlargement of the business. This growth in business has resulted from large mileage operated, the development of the country, advanced methods of operation and improvement in equipment. The business of the roads and the tonnage of traffic transported by them, not only in the item of lumber but also in traffic generally, has been most materially augmented (Tr., Pt. II., p. 1035).

While the operating expenses have grown larger and the percentage of operating expenses to gross earnings has increased, it is nevertheless true that both gross and net earnings have steadily increased. The gross earnings of the Southern Railway Company have increased from $25,353,086 in 1899 to $42,-

– POSSIBLE BLURRED PAGES

338,248 in 1903. The net earnings having increased from $8,853,160 to $12,552,179; the net earnings per mile of road have increased from $1,646 to $1,761. A similar increase in the earnings is true with respect to each of the other defendants (Tr., Pt. II., p. 1037). The true net earnings are greater than the figures indicate, inasmuch as there are included in operating expenses, permanent improvements or betterment of the property of the roads, such as expenditures for right of way and station grounds, real estate, grading, tunnels, bridges, station buildings, grain elevators, storage warehouses, docks and wharves, and other miscellaneous structures (Tr., Pt. II., p. 1037). In 1903 the Southern Railway expended $493,358 on account of construction and $1,350,328 on account of equipment, all of which is charged to operating expenses (Tr., Pt. II., p. 1038).

During the period of business depression the roadbed and equipment of the defendants ran down. After this period had passed unusual expenditures were made to restore the property so as to accommodate the greatly increased traffic (Tr., Pt. II., p. 1039).

The expenses of the sawmill business have increased in like manner as the expenses of the railroads. There has been an advance in cost of nearly everything that goes into the manufacture of lumber (Tr., Pt. II., p. 1039).

11 (12). The financial condition of the principal defendants appears to have steadily improved for a number of years up to and including the year 1903, in which the advance in rates complained of was made. They were comparatively prosperous at the date of and for years prior to the advance.

The Southern Railway Company has declared dividends for each year from 1897 to 1903, both inclusive, ranging from $543,000 (1 per cent. on $54,300,000 of preferred stock), in 1897, up to $4,500,000 (7 1/2 per cent. on $60,000,000 of preferred

CUND CLOSE IN CENTER BOOK TOO LARGE FOR FILMI

stock) in 1903. That road also reports surpluses of from $464,013 in 1898 to $2,100,897 in 1902.

The Louisville and Nashville Railroad Company has declared dividends for each year from 1899 to 1903, both inclusive, ranging from $1,848,000 (about 3 1/2 per cent. on $54,912,520 of common stock), in 1899, up to $3,000,000 (5 per cent. on $60,000,000 of common stock), in 1903. That road also reports surpluses of from $40,204, in 1899, to $2,987,195, in 1903.

The Atlantic Coast Line Railroad Company has declared dividends for each year (except the year 1900) from 1894 to 1903, both inclusive, ranging from $318,399, in 1894 (5 1/2 per cent. on $323,500 of preferred stock, and about 5 per cent. on $7,021,950 of common stock), up to $1,714,075 (5 per cent. on $1,744,100 of preferred stock and 5 per cent. on $36,650,000 of common stock), in 1903. The surpluses reported by that road are from $86,875, in 1894, to $1,293,983 in 1903. In 1900 no dividend was declared, but there was a surplus reported of $2,152,406

The Nashville, Chattanooga and St. Louis Railway Company declared dividends ranging from $100,000, in 1899 (being 1 per cent. on $10,000,000 of common stock), to $400,000 in 1895, 1896, 1897 and 1897, being 4 per cent. on $10,000,000 of common stock. For each year from 1900 to 1903, that road reported surpluses ranging from $566,907, in 1900, to $823,480 in 1903.

The Georgia Southern and Florida Railway Company declared dividends for each year, from 1897 to 1903, ranging from $27,360 (being 4 per cent. on $684,000 of preferred stock) in 1897, up to $99,240 in 1901 (being 5 per cent. on $684,000 of preferred stock and 6 per cent. on $1,084,000 of preferred stock), in 1903. For each of the years 1902 and 1903, it declared a dividend of $77,560. The surpluses reported from 1896 to 1903 range from $9,657 to $107,060. The surplus for 1901 was $24,165; for 1902, $41,448; and for 1903, $77,968.

The Seaboard Air Line Railway Company has de-

G – POSSIBLE BLURRED PAGES

cleared no dividends, but reports surplus of $252,676 for 1901, $769,331 for 1902, and $754,431 for 1903. The Central of Georgia Railway Company declared no dividends, but reports surpluses for each of the years from 1899 to 1903, both inclusive, ranging from $58.888 in 1899 to $203,506 in 1903. The Macon and Birmingham Railway Company has declared no dividends and reports a deficit for each of the years from 1894 to 1903, both inclusive, ranging from $29,099 in 1902 to $96,715 in 1894. The deficit reported for 1901 was $34,313, for 1902, $29,099, and for 1903, $45,949 (Tr., Pt. II., pp. 1039–1040).

12 (13). No special cars are furnished or required for hauling lumber. From 50 to 60 per cent. of the lumber shipped west goes in flat cars. These care are required to be equipped with standards, braces and supports at the expense of the shipper. The cost of such equipment is approximately $3.50 a car. The equipment is removed at the end of the journey and is not returned to the shipper, so that new equipment is required for every shipment (Tr., Pt. II., pp. 1040–1041).

The flat car is the cheapest car built by the roads and it costs somewhat less and is easier to load than a box car (Tr., Pt. II., p. 1041).

13 (14). It is seldom practicable to load cars to their full capacity with lumber. The box cars that are furnished cannot be loaded to their capacity. The average load varies from 68 to 86.5 per cent. of the capacity of the cars. The loading of lumber in the cars furnished is less than that of stone, coal, iron, and, perhaps, some other articles, but it is equal to or greater than most other commodities (Tr., Pt. II., pp. 1041–1042).

The findings of the Commission show specific facts as to the number of cars hauled and the average loading thereof (Tr., Pt. II., pp. 1042, 1043).

14 (15). Lumber is a constant business for the roads throughout the year; it is loaded by the ship-

CUND CLOSE IN CENTER BOOK TOO LARGE FOR FILMING

per and unloaded by the consignee; it is not perishable traffic, and therefore does not require rapidity of movement; there is little or no risk incident to its carriage, and in case of accidents the damage is, as a rule, insignificant. (Tr., Pt. II., p. 1043).

CONCLUSIONS OF THE COMMISSION.

The conclusions of the Commission were:

(*a.*) That complainants represented the public as well as themselves, and that it was not material whether the Georgia Sawmill Association was a combination in the form of a trust or not (Tr., Pt. II., pp. 1043–1045).

(*b.*) That the advance in lumber rates was the result of concerted action and a previous understanding between the railroad companies, eliminating and wholly inconsistent with the existence of competition (Tr., Pt. II., pp. 1045–7).

(*c.*) That the advance was made under such conditions as to bring the case within the rule that "Where an advance is made in rates which have long been maintained and the evidence shows that the traffic affected is large, important and constantly increasing, the advance will be held unjust unless it is satisfactorily explained" (Tr., Pt. II., pp. 1047–8).

(*d.*) That the previous rate was remunerative to the companies and their attempted justification of the advance, resting on the contention that they were entitled to share in the supposed increased prosperity of the lumber dealers, is without merit (Tr., Pt. II., pp. 1048–9).

(*e.*) That the test of the reasonableness of a rate is not the amount of the profit in the business of a shipper or manufacturer, but whether the rate yields a reasonable compensation for the services rendered (Tr., Pt. II., p. 1048).

= POSSIBLE BLURRED PAGES

(*f.*) That the greater the tonnage the lower should be the rate (Tr., Pt. II., p. 1049).

(*g.*) That permanent improvements should be excluded from "operating expenses" in determining the earnings of a railway company, and on this basis the percentage of operating expenses to gross earnings (as claimed by defendants) is materially reduced (Tr., Pt. II., pp. 1049-50).

(*h.*) That the advance is sought to be justified on the ground that additional revenue was needed. But that carriers have no right to advance a rate which is already reasonably high and which yields an adequate return, solely because additional revenue is needed (Tr., Pt. II., pp. 1051-2).

(*i.*) That freight rates cannot be fixed or advanced to any rate the carrier deems fit, merely because "the traffic will move" at such rates (Tr., Pt. II., pp. 1051-2).

(*j.*) That the return of cars empty and failure to load cars to capacity will not justify the advance because these conditions existed when the prior rates were fixed and must have been taken into account then (Tr., Pt. II., pp. 1052-3).

(*k.*) That the rates on lumber should be materially less than those on other commodities produced in Georgia and Florida and shipped to the Central West because lumber is less valuable; the hazard in transit and cost of handling less (Tr., Pt. II., p. 1053).

(*l.*) That the small revenue per ton per mile to the intermediate carriers is due to the large allowances made to the originating roads. That such allowances existed before the advance. That the disproportion cannot be remedied by an advance of the total through rates charged the public. That it

CUND CLOSE IN CENTER BOOK TOO LARGE FOR FILMIN

is the total rate and not its proportions or division which is in issue (Tr., Pt. II., pp. 1053–4).

(*m.*) That under the materially lower rates in force for many years prior to the advance the lumber traffic had been a paying business to the roads. Their net revenue grew larger from year to year during that period, and, as the tonnage of lumber also constantly increased, the increase in net revenue may be fairly attributed in part to lumber (Tr., Pt. II., pp. 1054–1055).

The conclusions of the Commission in full are referred to (Tr., Pt. II., pp. 1043–1055).

Decision of the Commission.

The resulting decision of the Commission was that the advance in the lumber rates was not warranted by the facts and conditions and that the rates were unreasonable and unjust (Tr., Pt. II., p. 1055).

Order of the Commission.

The order of the Commission on these findings and conclusions was as follows:

"It is ordered that the advance of 2 cents per 100 pounds, established on June 22, 1903, over rates previously in effect for the transportation of lumber in car-loads from shipping points on the respective lines of the defendant railroad companies in the State of Georgia to Cincinnati, Louisville, Evansville, Cairo, and other points on the Ohio River commonly called and known as Ohio River points, which said advance has since been maintained and enforced by the defendants, was and is excessive, unreasonable and unjust and in violation of the provisions of the Act to Regulate Commerce and the rates and charges resulting from the said advance made by defendants (which said rates and charges are more specifically referred to in said report and opinion) are also excessive, unreasonable and unjust, and in violation

– POSSIBLE BLURRED PAGES

of the provisions of the Act to Regulate Commerce; and that the defendants, The Southern Railway Company, The Atlantic Coast Line Railroad Company, The Louisville and Nashville Railroad Company, the Nashville, Chattanooga and St. Louis Railway Company, The Seaboard Air Line Railway, The Central of Georgia Railway Company, The Georgia Southern and Florida Railway Company, and the Macon and Birmingham Railway Company, be, and each of them is hereby notified and required to cease and desist, on or before the first day of April, 1905, from further maintaining or enforcing said unlawful advance of two cents per 100 pounds, or the said unlawful rates and charges resulting therefrom, for the transportation of lumber as aforesaid.

"And it is further ordered, that a notice embodying this order be forthwith sent to each of the defendant corporations, together with a copy of the report and opinion of the Commission herein, in conformity with the provisions of Section 15 of the Act to Regulate Commerce."

Tr., Pt. II., pp. 1057–1058.

THE FINDINGS OF THE COURT.

The Judge of the Circuit Court upon the evidence before the Commission, the findings of fact by the Commission and the additional evidence by affidavit and his findings thereon, reached substantially the same conclusions—both of law and fact—reached by the Commission, and thereupon handed down his opinion and entered the final decree in this cause already referred to and quoted, *ante*, pp. 8–11.

Tr., Pt. III., pp. 1202–1221.

Tift *v.* Southern Ry. Co., 138 Fed. Rep., 753.

BOUND CLOSE IN CENTER BOOK TOO LARGE FOR FILMI

BRIEF.

I.

The Interstate Commerce Commission had power to adjudge the advanced rate unreasonable and the Circuit Court had jurisdiction to enforce the order of the commission by injunction and a decree for an accounting.

Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S., 426, 431, 437, 438, 439, 440, 441, 442, 444, 448.

New York, N. H. & Hartford R. Co. *v.* Interstate Com. Com., 200 U. S., 361, 362, 404, 405.

There was no attempt in the case at bar to fix a rate. But the Commission decided that the advanced rate was unreasonable and ordered it discontinued, and this decision was enforced by the decree of the Circuit Court. Hence the procedure in this case is in full accord with the decisions of this court.

Texas & Pac. Ry. Co. *v.* Abilene Oil Co., *supra.*

C. N. O. & T. P. Ry. Co. *v.* Interstate Com. Com., 162 U. S., 184, 196, 197.

Interstate Com. Com. *v.* C. N. O. & T. P. Ry. Co., 167 U. S., 479, 499, 505.

Beale & Wyman R. R. Rate Regulation, § 1046.

It is true that judicial remedies inconsistent with the purposes of the act or in derogation of the

G – POSSIBLE BLURRED PAGES

powers of the Interstate Commerce Commission are abrogated by the Act to Regulate Commerce.

Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S., 426.

But on the other hand remedies in aid of the Act to Regulate Commerce, not inconsistent with the powers conferred upon the Commission, are clearly contemplated by the act itself as existing in the courts of the United States.

Act to Regulate Commerce, §§ 1, 16, 22.

While the original bill in this case was filed *before* application to the Commission (*ante*, pp. 2, 3) no final action was taken by the Court until *after* the decision and order of the Commission (*ante*, pp. 4, 5, 6, 7), and then it was taken, not only upon the original, amended, and supplemental bill of the complainants, but also upon the *petition* (*ante*, pp. 6, 7) of the complainants invoking the jurisdiction of the Court anew to enforce the order of the Commission, as provided in § 16 of the Act to Regulate Commerce when obedience to an order of the Commission is refused.

Tr., Pt. I., pp. 278-280.

The only additional relief afforded by the final decree which might not have been proper upon the *petition* to enforce the order of the Commission, and is therefore based upon the supplemental bill, is the order of reference in order that restitution may be made (*ante*, pp. 10, 11). But this was proper because, in accordance with the stipulations entered into by the defendants in open court (*ante*, pp. 4, 5, 6, 7, 8, 9), and their petition and bond for a supersedeas (*ante*, pp. 11, 12, 13). These stipulations and agreements constituted a waiver of any contention for the right of trial by jury on the part of the defendants.

BOUND CLOSE IN CENTER BOOK TOO LARGE FOR FILM

That on such a state of the record equity had jurisdiction to order the reference, take an account and decree restitution, is clear upon settled principles of equity jurisdiction.

"If the controversy contains any equitable feature or requires any purely equitable relief which would belong to the exclusive jurisdiction or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the Court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority."

1 Pomeroy's Eq. Jurisp. (3d ed.), § 181.
Peck *v.* School Dist., 21 Wis., 516, 523.
United States *v.* Union Pacific Ry. Co., 160 U. S., 1, 52.

Jurisdiction in equity being acquired for the purposes of an injunction to prevent the enforcement of the advanced rates, the Court, in order to avoid a multiplicity of suits, can proceed to a decree that will settle all matters in dispute between the complainants and the railroad companies.

United States *v.* Union Pacific Ry. Co., 160 U. S., 1, 50, 52.

"The proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission" [or in the case at bar by the railroad companies through their schedule of rates in compliance with the Interstate Commerce Act] "is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the

NG – POSSIBLE BLURRED PAGES

rates as being within the limits of a just compensation for the service rendered."

Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S., 418; concurring opinion of Mr. Justice Miller, p. 460.

There is no adequate remedy at law.

Van Patten *v.* Chicago, M. & St. P. Ry. Co., 81 Fed. Rep., 545, 551, 552.

We therefore submit that if the Circuit Court was without *primary* jurisdiction in this case to enjoin the enforcement of the advanced rates and decree reparation through an accounting, it acquired *secondary* jurisdiction, justifying the final decree herein (*ante*, pp. 8–11) under the *petition* based on the order of the Interstate Commerce Commission and the stipulations of the defendants as to what decree might be entered (*ante*, p. 7, Tr.; Pt. III., p. 1228), and what reparation would be made (*ante*, pp. 8, 9).

II.

Under the "Act to Regulate Commerce" the judicial power to enforce that act is necessarily vested in the Federal courts exclusively and in its enforcement those courts must apply the principles of the common law.

Act to Regulate Commerce, §§ 16 and 22.

The Federal courts are *without common law jurisdiction*, but in cases involving questions of general common law, which come before those courts *under their constitutional and statutory jurisdiction*, they

BOUND CLOSE IN CENTER BOOK TOO LARGE FOR FILM

have the right and it is their duty to declare and apply the common law.

"Is there a Federal Common Law?" 52 Alb. Law Journal, 247, 249, 250, 251.
U. S. *v.* Cruikshank, 92 U. S., 564.

"There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this Court in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority."

Smith *v.* Alabama, 124 U. S., 465, 478, 479.
Moore *v.* United States, 91 U. S., 270.
Murray *v.* Chicago, &c., Ry. Co., 62 Fed. Rep., 24, 41–42.

"In determining the obligations assumed by a common carrier engaged in interstate commerce, the Court has the right to apply the rules of the common law, unless the same have been changed by competent legislative action, and therefore, in the present case, all shipments made before the adoption of the Interstate Commerce Act are governed by the common law, and those made since the adoption of that act by the common law as modified by that act."

Murray *v.* Chicago, &c., Ry. Co., 62 Fed. Rep., 24, 42.

"Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as

G – POSSIBLE BLURRED PAGES

the Interstate Commerce Act, 24 Stat., 379, C. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers."

Interstate Com. Com. *v.* B. & O. Railroad Co., 145 U. S., 263, 275.

"The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights."

Interstate Com. Com. *v.* B. & O. Railroad Co., 145 U. S., 276.

"Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment."

Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S., 92, 102.

When an order of the Interstate Commerce Commission is violated by the railroads to which it applies, equity has jurisdiction to enforce it.

Interstate Com. Com. *v.* So. Pac. Co., 74 Fed. Rep., 42.

"Under its general chancery jurisdiction, a court of equity has power to remedy wrongs consisting of the violation by a carrier of the provisions of the

OUND CLOSE IN CENTER BOOK TOO LARGE FOR FILMING

interstate commerce law prohibiting discrimination between shippers."

U. S. *v.* Mich. Cent. R. Co., 122 Fed. Rep., 544.

III.

Whenever a right claimed under the Interstate Commerce Act is asserted, a Federal question is presented and the general jurisdiction of the Courts of the United States attaches.

In re Lennon, 166 U. S., 548, 553.
Tennessee *v.* Davis, 100 U. S., 257, 264.

"It is immaterial what rights the complainant would have had before the passage of the interstate commerce law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of Federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States."

Taft., *J.*, in Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. Rep., 730, 732.
Same Case, opinion per Ricks, *J.*, 54 Fed. Rep., 746.
Interstate Com. Com. *v.* So. Pac. Co., 74 Fed. Rep., 42.

"Whatever jurisdiction a court of equity may entertain of this controversy may be entertained here, if not under the regulations of the Interstate Commerce Act, prescribing certain remedies, then under the Judiciary Act, giving us the powers of an equity

POSSIBLE BLURRED PAGES

court as to all cases and controversies arising under any act of Congress."

Little Rock, etc., R. Co. *v.* E. T. V. & Ga. R. Co., 47 Fed. Rep., 771, 774.

Diversity of citizenship is not necessary in a case arising under a Federal statute when such statute is the basis of the right or privilege, or claim or protection or defense of the party, in whole or in part, by whom it is set up.

Lowry *v.* Chicago, etc., R. Co., 46 Fed. Rep., 83, 86.

Tennessee *v.* Davis, 100 U. S., 257.

Kentucky & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed. Rep., 567.

"Circuit courts of the United States have jurisdiction of a bill in equity to restrain violations of the interstate commerce law to the irreparable injury of the complainant, because of the subject-matter, and without regard to the citizenship of the parties."

Toledo, etc., Ry. Co. *v.* Pennsylvania Co., 54 Fed. Rep., 730.

U. S. *v.* Missouri Pac. Ry. Co., 65 Fed. Rep., 903.

"Irrespective of this, however, we think the bill exhibited a case arising under the Constitution and laws of the United States, as it appears to have been brought solely to enforce a compliance with the provisions of the Interstate Commerce Act of 1887, and to compel the defendants to comply with such act, by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from refusing to receive from complainant for tranportation over their lines any cars which might be tendered them. It has been frequently held by this Court that a case arises under the Constitution and laws of the United States, whenever the party plaintiff sets up a right to which he is entitled under such laws, which the parties defendant deny to him,

CUND CLOSE IN CENTER BOOK TOO LARGE FOR FILMIN

and the correct decision of the case depends upon the construction of such laws. As was said in *Tennessee* v. *Davis*, 100 U. S., 257, 264: 'Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.' See also *Starin* v. *New York*, 115 U. S., 248, 257; *Kansas Pacific Railroad* v. *Atchison, Topeka, &c., Railroad*, 112 U. S., 414; *Ames* v. *Kansas*, 111 U. S., 449, 462; *Railroad Co.* v. *Mississippi*, 102 U. S., 135."

In re Lennon, 166 U. S., 548, 553-554.

IV.

The general equity jurisdiction of the Circuit Courts of the United States is preserved in the Act to Regulate Commerce by the express provisions of Section Twenty-two of the act, and those courts have equitable jurisdiction to aid in the enforcement of the act by enjoining the collection of unreasonable rates and enforcing the orders of the Commission for the discontinuance of such rates.

Act to Regulate Commerce, §§ 1, 16 22.

The State courts no longer have jurisdiction to pass upon the reasonableness of rates and enjoin the enforcement of unreasonable rates by interstate carriers.

Tex. & Pac. Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S., 426.

– POSSIBLE BLURRED PAGES

The Interstate Commerce Commission has no power to enjoin the collection of unreasonable rates or to adjudge them unreasonable until they have actually been put in effect.

C. N. O. & T. P. Ry. Co. *v.* Interstate Com. Com., 162 U. S., 184, 196, 197.
Interstate Com. Com. *v.* C. N. O. & T. P. Ry. Co., 167 U. S., 479, 504–506, 508, 509, 511.

Nor has the Commission power to *enforce* an order finding rates unreasonable and directing their discontinuance as in the case at bar. The courts must do this.

Act to Regulate Commerce, § 16.
Ky. & Ind. Bridge Co. *v.* L. & N. R. Co., 37 Fed. Rep., 567.

Hence the only remedy is by suit in equity in the Circuit courts of the United States.

In re Lennon, 166 U. S., 548.

There is no escape from the logic of these propositions except by holding that Congress deliberately deprived the Circuit courts of jurisdiction without conferring it upon any other tribunal, and that Section 22 of the Interstate Commerce Act is without effect in the provision that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this act are *in addition* to such remedies."

Act to Regulate Commerce, § 22.

It is no answer to these propositions to argue that an appeal to the Federal courts in equity without previous action by the Commission will result in discrimination and the determination of the reasonableness of rates differently by different courts. The relief by temporary injunction to prevent irreparable injury and a multiplicity of suits will not fix the rates; they can be determined either as reasonable or unreasonable by the Commission, as in

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the case at bar, or by the Court, and, if adjudged unreasonable, the decree must of necessity apply equally for the protection of all shippers because the rate, being held unreasonable, its enforcement will be enjoined at the suit of one for the benefit of all. To this extent the jurisdiction of the Circuit Court in equity should surely be adjudged to exist unimpaired and positively recognized by the Act to Regulate Commerce.

Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S., 418; concurring opinion of Mr. Justice Miller, p. 460.

Smyth *v.* Ames, 169 U. S., 466.

V.

Both the Interstate Commerce Commission and the Court below having held the advance in lumber rates by the defendant railroad companies unreasonable as a matter of fact, and having reached this conclusion of fact upon a proper consideration of all the evidence and a correct application of the Interstate Commerce Act and the rules of law, this Court will not disturb the conclusion by reviewing the evidence to ascertain whether the finding is sustained by the weight of the evidence or not.

Tift *v.* Southern Ry. Co., 10 Interstate Com. Rep., 548 *et seq.*

Tift *v.* Southern Ry. Co., 138 Fed. Rep., 753 *et seq.*

Ante, pp. 14-26, "Findings of Fact."

The procedure in the Circuit Court in the matter of admitting further evidence was correct.

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"The case was heard on the testimony taken in the proceeding before the Commission and the documents forming a part of the same, and upon further documents and testimony stipulated by counsel."

N. Y., N. H. & H. R. Co. *v.* Interstate Com. Com., 200 U. S., 361, 385.

To paraphrase an opinion of this Court:

The Circuit Court proceeded, "as a court of equity, to hear and determine the matter, and in such manner as to do justice in the premises" * * * "The findings of the Commission were" *affirmed* "by the Circuit Court after additional evidence taken in the Court, and the decision of the Circuit Court was reviewed in the light of the evidence and" *affirmed* "by the Circuit Court of Appeals" * * * "Such a holding clearly implies that there was power in the courts below to consider and apply the evidence, and in this Court to *review* their decisions."

Int. Com. Com. *v.* Alabama Mid. Ry. Co., 168 U. S., 144, 174.

This Court will not enter upon the consideration of conflicting evidence in order to overturn the findings of fact by the Commission and the Circuit Court, nor for the purpose of reviewing the case upon the facts.

"Being then constrained to the conclusion that the order of the Commission was not sustained by the facts upon which it was predicated, we cannot enter into an independent investigation of the facts, even if it be conceded the record is in a condition to enable us to do so, in order that new and substantive findings of fact may be evolved, upon which the order of the Commission may be sustained."

Interstate Com. Com. *v.* C. B. & Q. R. Co., 186 U. S., 320, 341, 342.

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"As already stated, the Circuit Court of Appeals adopted the views of the Circuit Court in respect to the reasonableness of the rate charged on first class freight carried on defendant's line from Cincinnati to Atlanta; and as both courts found the existing rates to have been reasonable, we do not feel disposed to review their findings on that matter of fact."

C. N. O. & T. P. Ry. Co. *v.* Interstate Commerce Commission, 162 U. S., 184, 196.

The Interstate Commerce Commission "is peculiary competent to pass upon questions of fact of the character here arising."

L. & N. R. Co. *v.* Behlmer, 175 U. S., 648, 675, 676.

The burden was on the railroad companies to show in the Circuit Court that the facts on which the Commission acted were not as found and reported by the Commission.

Interstate Com. Com. *v.* C. H. & D. Ry. Co., 146 Fed. Rep., 559, 561.

Interstate Com. Com. *v.* L. & N. R. Co., 118 Fed. Rep., 613, 622.

"It has been forcibly argued that in the present case the Commission did not give due weight to the facts that tended to show the circumstances and conditions were so dissimilar as to justify the rates charged. But the question was one of fact peculiarly within the province of the Commission whose conclusions have been accepted and approved by the Circuit Court of Appeals, and we find nothing in the record to make it our duty to draw a different conclusion."

C. N. O. & T. P. Ry. Co. *v.* Interstate Commerce Commission, 162 U. S., 184, 194.

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"The defendant was entitled to have its defence considered, in the first instance, at least, by the commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact to be passed upon by the Commission in the light of all the facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake, of its own motion, to find and pass upon such questions of fact in a case in the position in which the present one was."

Texas & Pacific Ry. Co. *v.* Interstate Commerce Commission, 162 U. S., 197, 238.

E. T. V. & G. Ry. Co. *v.* Interstate Commerce Commission, 181 U. S., 1, 28.

"A series of decisions of this Court has established the rule that successive and concurrent decisions of two courts in the same case upon a mere question of fact are not to be reversed unless clearly shown to be erroneous. This rule, more often invoked in admiralty cases, is yet equally applicable to appeals in equity."

Towson *v.* Moore, 173 U. S., 17, 24.

Dravo *v.* Fabel, 132 U. S., 487, 490.

Stuart *v.* Hayden, 169 U. S., 1, 14.

Baker *v.* Cummings, 169 U. S., 189, 198.

"As the Circuit Court and the Circuit Court of Appeals agree as to what were the ultimate facts established by the evidence, this Court should accept their view as to the facts, unless it clearly appeared that they erred as to the effect of the evidence."

Stuart *v.* Hayden, 169 U. S., 1, 14.

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"There is evidence upon which the fact as found might be based, and it is not so plainly erroneous as to call upon this Court to vary from its usual rule not to review the unanimous finding upon questions of fact of two courts, unless such finding is plainly erroneous."

Hy-Yu-Tse-Mil-Kin *v.* Smith, 194 U. S., 401, 412.

VI.

In the absence of legislation establishing rates, the reasonableness of a rate is a question of fact for judicial investigation and decision.

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."

Chicago, &c., Ry. Co. *v.* Minnesota, 134 U. S., 418, 458, cited in
Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 398.
Chesapeake & Potomac Tel. Co. *v.* Manning, 186 U. S., 244.
Smyth *v.* Ames, 169 U. S., 466, 523.
Covington etc. Turnpike Co. *v.* Sandford, 164 U. S., 578, 592, 593.

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing

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to prescribe rates which shall be charges in the future—that is a legislative act."

Interstate Commerce Com. *v.* C. N. O. & T. P. Ry. Co., 167 U. S., 479, 499, and cases cited.

"In the present case, where an application is made to the Supreme Court of the State to compel common carriers, namely the railroad companies, to perform the services which their duty requires them to do for the general public, it is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the Commission. I think the Court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the Commission before granting such relief that it would have if called upon so to do by a bill in chancery."

Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S., 418; concurring opinion by Mr. Justice Miller, 460.

VII.

The Interstate Commerce Act adopts into the Federal statute law, in so far as concerns interstate traffic, the common law principle prohibiting unreasonable rates and unjust discriminations.

"The first section simply enacted the common law requirement that all charges shall be reasonable and just."

Interstate Com. Com. *v.* C., N. O. & T. P. Ry. Co., 167 U. S., 479, 494, 501.
4 Thompson on Corp., § 5547.

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The Interstate Commerce Act expressly provides that all charges "shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Act to Regulate Commerce, § 1, 24 U. S. Statutes at Large, 379.

This is one of the principal objects of the Act.

Interstate Com. Com. *v.* B. & O. R. Co., 145 U. S., 263, 276.

VIII.

Both the Interstate Commerce Commission and the Circuit Court had power to determine that the advance in rates was unreasonable, and the Court had jurisdiction to prevent the enforcement of the rate by injunction, both before and after the order of the Commission directing the discontinuance of the rate as unreasonable.

Act to Regulate Commerce, §§ 1, 16, 22.

In re Lennon, 166 U. S., 548.

The courts have power to pass on the reasonableness or unreasonableness of railroad freight rates.

Covington, &c., Turnpike Co. *v.* Sandford, 164 U. S., 578, 579.

"A legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

Chicago & Grand Trunk Ry. Co. *v.* Wellman, 143 U. S., 339, 344.

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Stone *v.* Farmers' Loan & T. Co., 116 U. S., 307.
Chicago, Milwaukee, &c., Ry. Co. *v.* Minnesota, 134 U. S., 418.

In C. N. O. & T. P. Ry. Co. *v.* Interstate Commerce Commission, the Supreme Court, admitting the power of the Interstate Commerce Commission to find rates unreasonable, as matter of fact, denies the power of the commission to fix rates for the future, saying: "We prefer to adopt the view expressed by the late Justice Jackson, Circuit Judge, in the case of Interstate Commerce Commission *v.* Baltimore & Ohio R. Co., 43 Fed. Rep., 37, and this judgment was affirmed by this Court, 145 U. S., 263."

"'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.'"

Cin. N. O. & Tex. Pac. Ry. *v.* Int. Com. Com., 162 U. S., 184, 196, 197.

It follows that if the Interstate Commerce Act, with the above limitation, leaves the carriers with the right to make rates, it must also leave the Circuit Courts of the United States power to enjoin the putting into effect of rates that are extortionate, unreasonable and which would deprive shippers of their property without due process of law.

Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S., 418, 456-457.

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"It was contended that the plaintiffs had an adequate remedy at law, and that the Circuit Court of the United States, sitting in equity, was therefore without jurisdiction. This objection is based upon the fifth section of the Nebraska Statute authorizing any railroad company to show, in a proper action brought in the Supreme Court of the State, that the rates therein prescribed are unreasonable and unjust, and if that Court found such to be the fact, to obtain an order upon the Board of Transportation permitting the rates to be raised to any sum in the discretion of that Board, provided that in no case should they be fixed at a higher sum than was charged by the company on the first day of January, 1893. This section, it is contended, took from the Circuit Court of the United States its equity jurisdiction in respect of the rates prescribed and required the dismissal of the bills."

"We cannot accept this view of the equity jurisdiction of the Circuit Court of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that Court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a State court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States. * * * But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizen-

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ship *or upon any other ground of Federal jurisdiction.*

Smyth *v.* Ames, 169 U. S., 466, 515-516.

The Circuit Courts of the United States have jurisdiction in equity to enforce the orders of the Interstate Commerce Commission.

Interstate Com. Com. *v.* Lake Shore & M. S. Ry. Co., 134 Fed. Rep., 942.

IX.

The rates in force at the time of the advance complained of, having been long in effect and remunerative to the carrier, constituted fair compensation for the service performed and therefore the advance was unreasonable.

Ante, p. 23; Tr., Pt. II., pp. 1047-1049.
Beale & Wyman, Railroad Rate Regulation, §§ 399, 506.

The rates here in controversy are rates fixed by the carriers, not by Congress or the Commission. Therefore the Commission, and the Court below, had a right upon full consideration of all the facts and circumstances, to substitute their judgment for that of the carriers by holding the advance in rates unreasonable in fact.

Noyes on Am. Railroad Rates, pp. 211, 213.

"The reasonableness of the rate in a given case depends on the facts, and the function of the Com-

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mission is to consider these facts and give them their proper weight."

C. N. O. & T. P. Ry. Co. *v.* Interstate Commerce Commission, 162 U. S., 184, 196.

In the absence of competition between the defendants, by reason of their agreement as to the rates through the Southeastern Freight Association, it would seem that the findings of fact of the Commission upon which their ultimate finding that the advanced rate is unreasonable is based, when adopted by the Circuit Court and the Circuit Court of Appeals, as they have been, cease to be mere *prima facie* evidence of the unreasonableness of the rate and become overwhelmingly persuasive, if not actually conclusive, in the Supreme Court upon this appeal.

E. T. V. & G. Ry. Co. *v.* Interstate Commerce Commission, 181 U. S., 1.
L. & N. R. Co. *v.* Behlman, 175 U. S., 648.

X.

The advance in rates cannot be justified by the contention that larger dividends must be earned for the stockholders of defendant railroads, because a reasonably remunerative rate cannot be advanced to "all that the traffic will bear," merely to swell the net earnings of defendant railroads.

Ante, pp. 23 and 24.

"The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends."

Smyth *v.* Ames, 169 U. S., 466, 545.

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Covington, etc., Turnpike Co. *v.* Sandford, 164 U. S., 578.
Stanislaus County *v.* San Joaquin, &c., Co., 192 U. S., 201.

"In the discussion of this question the plaintiffs contended that a railroad company is entitled to exact such charges for transportation as will enable it at all times not only to pay operating expenses but also to meet the interest regularly accruing upon all its outstanding obligations and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to *all* those ends will deprive it of its property without due process of law, and deny to it the equal protection of the laws. This contention was the subject of elaborate discussion; and as it bears upon each case in its important aspects it should not be passed without examination.

In our opinion, the broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation. It is unsound in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interest of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public."

Smyth *v.* Ames, 169 U. S., 466, 543-544.

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XI.

The many grounds upon which the defendant railroads contended before the Interstate Commerce Commission and in the courts below that the advance in rates was reasonable as a matter of fact are disposed of by the findings of the Commission, the decree of the Circuit Court and the judgment of affirmance in the Circuit Court of Appeals.

Ante, pp. 8–11, 13, 14–23, 23–25.

If neither the Commission nor the courts below committed any error of law in determining the facts proven by the evidence and from them deducing the unreasonableness of the rate as matter of fact, this Court will not reverse the order of the Commission and the decree of the courts below merely because a different inference of fact might have been drawn from the evidence by the Commission or the courts below.

Interstate Com. Com. *v.* Alabama Midland R. Co., 168 U. S., 144, 175, 176.
Towson *v.* Moon, 173 U. S., 17.

"The Master, the Circuit Court and the Circuit Court of Appeals, having found that the Society had not been dissolved, either by consent of its members or by the abandonment of the purposes for which it was founded, this Court will not, on account of such concurrence and under the rules of the Court, review the disputed facts involved in that finding."

Schwartz *v.* Duss, 187 U. S., 8, 10, 26.

In the "ARGUMENT" which follows and supports this brief we have, however, reviewed the conten-

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tions of defendants that the advance in rates was reasonable and shown, as we think, that, on the evidence, the Commission and the courts below properly found the advance in rate to be unreasonable and unlawful.

XII.

There is no legal standard by which the reasonableness or unreasonableness of a rate fixed by a carrier for the transportation of a particular commodity can be tested as a matter of law.

Judson, Interstate Com., § 99.

In the absence of any such legal test the question is one of fact to be determined upon consideration of all the circumstances and conditions incident to the *status* of shipper and carrier and the nature of the particular commodity.

Judson, Interstate Com., § 120.

Minneapolis, &c., R. Co. *v.* Minnesota, 186 U. S., 257, 268.

Therefore the matter of the determination of the ultimate fact as to whether a given rate for the carriage of a particular commodity is reasonable or unreasonable is eminently one for expert knowledge and opinion and the Interstate Commerce Commission is peculiarly fitted by its constitution and experience to pass upon such questions.

Smyth *v.* Ames, 169 U. S., 466, 527.

Taft, *J.*, in E. T. V. & G. Ry. Co. *v.* Interstate Com. Com., 99 Fed. Rep., 52, 64.

L. & N. R. Co. *v.* Behlmer, 175 U. S., 648, 675.

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On the other hand, while this Court has repeatedly held that the judicial power extends to the point of adjudging that rates fixed by or under State laws are unlawful when due process of law is denied to the carriers or when the rates are equivalent to confiscation of property, yet it has never been held that this Court will pass upon the reasonableness or unreasonableness of a particular rate, *per se*, either as matter of fact or matter of law.

Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S., 418, especially the concurring opinion of Mr. Justice Miller, 459, 460.

Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 362, 397-399.

San Diego Land Co. *v.* National City, 174 U. S., 739, 754.

Covington, etc., Co. *v.* Sandford, 164 U. S., 578, 593.

Smalley: Railroad Rate Control, 48, 52, 54.

It seems to follow, when on a full hearing, after notice to all parties in interest, the Interstate Commerce Commission has found as a fact that such a rate, so fixed by a carrier, on a particular commodity is unreasonable, and this determination has been confirmed by the decree of a Circuit Court of the United States, passing anew upon the findings of the Commission, the evidence before the Commission and additional evidence adduced by the parties, that this Court will not review the questions of fact involved, but will find itself compelled to affirm the decrees of the courts below, and the order of the Commission, unless manifest error of law is shown, of such nature as either to constitute a taking of property without due process of law or a denial of the equal protection of the laws.

Noyes: Am. Railroad Rates, 226.

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Surely this Court will not undertake to decide in each case that arises whether on all the facts and circumstances necessary to be taken into account a rate is or is not reasonable. In such instances there must be some final arbiter of fact other than this august tribunal and to hold otherwise is to put it in the power of the railroads to virtually make it impossible for speedy and substantial justice to be done. The new declarations of National legislative policy upon the questions of regulation and control only add emphasis to the necessity of a definite enunciation by this Court of the principles for which, in this case, we contend.

Acts of Congress, June 28 and June 29, 1906.

XIII.

The advance in rate being the result of a combination among the defendant carriers in restraint of trade and not the product of free competition but the consequence of a suppression of competition, it is illegal and unreasonable and its enforcement was properly enjoined.

"Competition is a fact to be considered in determining whether rates are reasonable."

Int. Com. Com. *v.* Alabama Midland Ry. Co., 168 U. S., 144, 164.

Interstate Com. Com. *v.* B. & O. R. Co., 145 U. S , 263.

Hence the absence of competition, or agreements that suppress and prevent competition, are material and may be considered by the Commission.

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"The conclusion which we have drawn from the examination above made into the question before us, is that the Anti-Trust Act applies to railroads and that it renders illegal all agreements which are in restraint of trade or commerce, as we have above defined that expression."

United States *v.* Freight Assn., 166 U. S., 290, 341.

An agreement or association between railroads the natural and direct effect of which is to maintain rates at a higher level than would otherwise prevail, is in violation of the Sherman Act.

U. S. *v.* Joint Traffic Assn., 171 U. S., 505, 565, 575, 577.

"The necessary effect of the agreement is to restrain trade or commerce no matter what the intent was on the part of those who signed it."

United States *v.* Freight Assn., 166 U. S., 290, 342.

"In order to maintain this suit the Government is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce if such restraint is its necessary effect."

United States *v.* Trans-Missouri Freight Assn., 166 U. S., 291.

"It cannot be denied that those who are engaged in the transportation of persons or property from one State to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of the articles transported, such agreement would at least relate to the business of commerce and might more or less restrain it."

United States *v.* Trans-Missouri Freight Assn., 166 U. S., 290, 312.

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Any agreement or combination the tendency of which is to restrain competition between carriers is unlawful and in violation of the Anti-Trust Act.

Northern Sec. Co. *v.* U. S., 193 U. S., 198.

"The act requires that the rates charged shall be reasonable, but the standard of reasonableness under the act is that which results *from free competition among the carriers.*"

Van Patten *v.* Chicago, M. & St. P. Ry. Co., 81 Fed. Rep., 545, 553.

"It is said that as railroads have a right to charge reasonable rates it must follow that a contract among themselves to keep up their charges to that extent is valid." * * * The business which the railroads do is of a public nature, closely affecting almost all classes in the community—the farmer, the artisan, the manufacturer and the trader. It is of such a public nature that it may well be doubted, to say the least, whether any contract which imposes any restraint upon its business would not be prejudicial to the public interest.

United States *v.* Freight Assn., 166 U. S., 290, 333.

"That free and unrestricted competition in the matter of railroad charges might be productive of evils does not militate against the fact that such is the law now governing the subject. * * * The time may come when the companies will be relieved from the operation of this law, but they cannot, by combinations and agreements among themselves, bring about this change. The fact that the provisions of the Interstate Commerce Act may have changed in many respects the conduct of the companies in the carrying on of the public business they are engaged in does not show that it was the intent of Congress, in the enactment of that statute, to clothe railway companies with the right to combine to-

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gether for the purpose of avoiding the effects of competition on the subject of rates."

United States *v.* Freight Association, 166 U. S., 290, 337.

The language just quoted is from the dissenting opinion of Judge Oliver P. Shiras in the United States Circuit Court of Appeals in the Trans-Missouri case, as quoted and virtually adopted in the opinion of Mr. Justice Peckham in that case in the Supreme Court of the United States.

"The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable; while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it."

United States *v.* Freight Assn., 166 U. S., 290, 339.

It may be added that what is a reasonable rate for one company in a given territory may be wholly unreasonable for another differently and better situated in the same territory; therefore, any combination or agreement among them fixing rates is in violation of the Sherman Act.

In the "Argument" which follows this "Brief" we have fully discussed the facts as to the organization and nature of the Southeastern Freight Associa-

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tion and its connection with the suppression of competition in the advance of rates complained of. To that discussion we refer the Court (*post*, pp. 66-76).

XIV.

It is immaterial whether the Georgia Sawmill Association is a combination in restraint of trade or not, because the proceedings below necessarily inured to the benefit of all shippers, whether members of said association or not, and the association was not a party plaintiff in the Circuit Court.

Tift *v.* Southern Ry. Co., 10 Int. Com. Rep., 548, 551 and 577-579; Tr., Pt. II., pp. 1017 and 1043-1045.

The alleged fact that the Georgia Sawmill Association is a combination in restraint of trade, even if admitted, would not prevent that association or its members from maintaining a bill in equity to prevent an illegal and unreasonable charge by way of freight rates.

General Electric Co. *v.* Wise, 119 Fed. Rep., 922.

But the record fails to show, and the Commission and the Circuit Court did not find, it to be a combination in restraint of trade and commerce between the States.

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XV.

Appellants are estopped from questioning the jurisdiction of the Court below by the stipulations and agreements into which they entered, and have waived any right to demand a trial by jury as to their obligation to refund and the amount to be refunded by them to complainants and all other shippers of lumber at the advanced rate which has been adjudged unreasonable.

When counsel, in the course of a suit in equity, stipulate in connection with an application for a *supersedeas* as to payments to be made into court and the effect that shall be given to certain proceedings, the stipulation is binding and will be enforced.

Halliday *v.* Stuart, 151 U. S., 229.

"By * * * his proceeding to a hearing and decree without objection, his present contention in respect of deprivation of trial by jury came too late. Even if the action should have been an action at law, still the Court had jurisdiction, and a defective exercise of its power would only amount to an irregularity capable of being waived by the parties and susceptible of correction as any other mere errors are corrected."

Perego *v.* Dodge, 163 U. S., 160, 166.
Bank *v.* Okely, 4 Wheat., 235, 243.

Parties by their conduct or their silence may waive a right to trial by jury.

Baird *v.* The Mayor, 74 N. Y., 382, 386.
The Brooklyn, &c., R. Co. *v.* R. Co., 105 App. Div. (N. Y.), 88.
Book *v.* Justin Min. Co., 58 Fed. Rep., 827.

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Kelly *v.* Smith, 1 Blatchf., 290.
Southern Development Co. *v.* Silva, 89 Fed. Rep., 418.

"With the co-operation of the defendants and at their express instance the case has been heard not on the demurrer to the jurisdiction of the court separately, but on the demurrer's answers and affidavits, * * * the case is fully before the Court."
Tr., Pt. I., p. 202.

"If their contention shall be maintained it will be competent for the Court in its final decree to direct the respondents, or either of them, to make restitution of sums thus exacted. Indeed the learned special counsel for the respondents, by his statements made *in judicio*, binds his clients to promptly repay to the complainants all such sums in case they shall finally prevail."
Tr., Pt. I., p. 276.

"Counsel for the respondents stipulated *in judicio* that should the contention of the complainants prevail and the Court should decree the advance in rates complained of to be unreasonable and excessive, the respondents would promptly repay to the complainants all such sums paid by them in excess of the rates obtaining prior to the filing of the original bill."
Tr., Pt. III., p. 1227.

"On the hearing * * * counsel consented in open court that the cause should be fully heard upon all the *issues involved* and final decree rendered therein and also *agreed* that should the contentions of the complainants prevail it would be *competent* for the Court to take such action as was consonant with the stipulation made at Mt. Airy and the ruling of the Court based thereon without other or further pleadings."
Tr., Pt. III., p. 1228.

"Petitioners are willing, and here offer to keep an accurate account of each and every shipment of

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yellow pine lumber made from any of the lumber shipping points within the State of Georgia to Cincinnati, Louisville, Evansville, Cairo and other points on the Ohio River, commonly designated as Ohio River points or crossings, and to points basing on the Ohio River points or crossings, which accounts will show the dates of the shipments, the names of the consignors and consignees, the weight of lumber carried and the rate of freight charged; and to make reports to this Court of such shipments as often as the Court may so order; and your petitioners also hereby offer to execute a bond with sufficient surety to be approved by the Court, payable to the United States of America, or to such other payee as the Court may direct, in such reasonable penalty as the Court may order, conditioned for the prompt payment by your petitioners to such persons or person as may be legally entitled thereto, such amounts as your petitioners or any of them may collect pending said appeal over and above the reduced rates ordered by said decree; or said bond may be conditioned in such other manner as this Honorable Court may deem just and equitable to *protect* the *interests* of *shippers* and *consignees* pending said appeal."

Tr., Pt. III., p. 1241, the defendant's petition for supersedeas.

Upon this suggestion, agreement and stipulation of defendants in their petition for a supersedeas, the Court entered an order in accordance therewith.

Tr., Pt. III., p. 1243.

And on these stipulations, admissions, agreements and orders, the decision of the Interstate Commerce Commission that the advanced rate was unreasonable, having been affirmed in the Circuit Court, the final decree was entered, including the order of reference directing that the amounts unlawfully collected under the advanced rate by the defendants be ascertained and

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reported to the Court in order that it might direct repayment thereof by the defendants in accordance with their stipulations and agreements.

Tr., Pt. III., pp. 1227-29, and Tr., Pt. III., pp. 1242-43.

Surely, on these facts there was a submission by defendants to the equity jurisdiction of the Court and any right to a trial by jury on the question of "restitution" was waived.

ARGUMENT.

First.

THE SUIT WAS PROPERLY BROUGHT ORIGINALLY IN THE UNITED STATES CIRCUIT COURT.

At the time the suit was filed, to wit, April 14, 1903, the railway companies had given notice of and were on the eve of putting into effect an advance in the rates which complainants believed would seriously impair, if not destroy, the business of the Georgia lumbermen in the territory affected.

They could not obtain any preventive relief from the Interstate Commerce Commission. The Commission cannot exercise judicial power or enjoin the putting into effect of proposed rates, no matter how unreasonable or unjust they may be.

Interstate Com. Com. *v.* C., N. O. & T. P. R. Co., 167 U. S., 479.

Unless, therefore, jurisdiction rested in the Court to grant preventive relief, the complainants would have been remediless. It is within the province of a court of equity to enjoin threatened wrong that would work irreparable injury. It is not necessary that persons aggrieved should await the actual infliction of the injury before seeking redress. Let it

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be supposed that the threatened advance was so excessive as to manifestly and certainly destroy the business of the complainants in the Western markets, and defeat competition in those markets. It is not to be conceived that complainants would have been forced to wait until the rates were actually put into effect and their business destroyed, and content themselves with the ordinary remedies against excessive charges. Pending such redress, no matter how promptly received, irreparable injury would have been occasioned. If the Court would have been authorized to enjoin further enforcement of the rate after it had become effective and after complaint had been made to the Commission, it is difficult to perceive why it did not have power to enjoin the rate before the injury was inflicted.

This case furnishes a strong illustration of the necessity for the course that was pursued. The enforcement of the advanced rate caused a material falling off in the business of the saw mill men in the affected territory (Tr., Pt. II., pp. 1027, 1028). Owing to the magnitude of the issues, more than eighteen months elapsed after the rate went into effect before the Commission handed down its Report and Opinion. During all of this time the saw mill men were losing profits on sales that would have been made under just and reasonable rates. Such injury is irreparable and incapable of pecuniary estimation.

Relief by way of injunction against extortionate and unjust discriminations was available under the chancery practice before the enactment of the Act to Regulate Commerce.

1 High on Injunc., § 616.

Rogers Loc. Wks. *v.* Erie, etc., R. Co., 20 N. J. Eq , 379.

Schofield *v.* Lake Shore R. Co., 43 Ohio St., 571.

The inadequacy of the legal remedy in such case is shown in the Schofield case, last above cited, and

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in the case of United States *v.* Union Pacific R. Co., 160 U. S., 1.

As has been shown in the Brief (*supra*, pp. 27–30), the Act to Regulate Commerce vests in the courts of the United States jurisdiction to enforce the rights declared or created in the Act; and in the exercise of this power the courts may employ all existing judicial remedies both at law and in equity. The Federal courts may therefore enjoin a proposed excessive and unjust rate, unless the power has been abrogated by the Act itself.

The recent case of Texas & Pacific R. Co. *v.* Abilene Cotton Oil Co., 204 U. S., 426, is very instructive on this point. Broadly stated, we understand that decision to mean that the exercise of a judicial power that would prove inconsistent with the great purpose of the Act, has been forbidden. On the other hand, § 22 of the Act expressly preserves such existing judicial remedies as may be in aid of the intent and design of the Act, which is to provide a safe, easy and expeditious mode of reaching and preventing abuses, and of promoting commerce between the States.

The distinction between the Abilene case and the instant case, both in the facts and in the procedure adopted, is manifest.

The Abilene case was an action at law in a State court to recover damages for alleged excessive charges under a lawfully established rate, which had not been declared unreasonable by the Interstate Commerce Commission. The recovery was for the sole benefit of the plaintiff and would have resulted in giving him a preference over other shippers—one of the things condemned by the Act to Regulate Commerce. The recovery was based upon the refusal of the railway company to enter into an agreement which the Act makes criminal.

The instant case is a suit in equity to enjoin the putting into effect of an advance in rates *that had not been established*. The suit was in the *interest of the public*, and the relief granted will operate

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equally in favor of all shippers. The evils pointed out in the Abilene case could not follow this case. No undue preference can result from enjoining the advance. There can be no divergence between the Court and the Commission for that the Commission first made its findings, in which the Court concurred. There can be no divergence or conflict between courts in different jurisdictions, because the Court had full jurisdiction over all necessary parties and the whole subject of the controversy was involved and decided.

Second.

THE COMMISSION HAVING PRIMARILY FOUND THE ADVANCE TO BE UNREASONABLE, AND THE COURT HAVING CONCURRED IN AND ENFORCED THIS FINDING, THE PROPER PROCEDURE HAS BEEN ADOPTED.

The Circuit Court, at the first hearing under the rule to show cause, dissolved the temporary restraining order and permitted the advanced rates to be put into effect in order that the Interstate Commerce Commission might in the first instance determine the reasonableness of the advance.

Tr., Pt. I., pp. 202, 204; *ante*, pp. 3-4.

The advanced rates were put into effect on June 22, 1903. On the day following, the appellees (complainants) presented their complaint to the Commission (*ante*, pp. 4-5). On June 27, appellees applied to the Circuit Court for an injunction pending the investigation before the Commission. This application was answered on its merits by the appellants. The Court withheld the injunction upon the stipulation of appellants that they would make restitution of sums exacted under the advanced rates, if the advance should be adjudged illegal, and upon

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the assumption that the Commission would shortly render its report (*ante*, p. 5, 123 Fed., 789,796). The Commission heard the evidence in October, 1903, and filed its report and opinion under date of February 7, 1905, finding and declaring the advance to be unreasonable, unjust and in violation of the Act to Regulate Commerce, and ordering the appellants to desist from enforcing and collecting such advanced rates (*ante*, p. 6). On March 17, 1905, appellees presented their petition to the Court reciting the proceedings before the Commission and filing a certified copy of the report and opinion and of the order of the Commission. The prayers of the petition were in effect for the enforcement of this order and the granting of injunctions, both *pendente lite* and permanent (*ante*, p. 6). The appellants filed no demurrer to this petition, but answered to the merits, insisting that the findings of the Commission were contrary to the weight of the evidence and that the conclusions and the order founded thereon were erroneous, illegal and void and should not be enforced by the Court (*ante*, pp. 6–7). The evidence taken before the Commission was stipulated into the case, subject to the right to offer additional evidence; and on the final hearing additional evidence was offered and admitted (*ante*, p. 8).

The cause proceeded essentially as if it was only a suit to enforce the order of the Commission. It was so treated by the respective parties. The learned counsel for appellants stated in his brief in the Circuit Court of Appeals (p. 3) that "the decree of the Circuit Court was in effect an approval of the order issued by the Interstate Commerce Commission on the 7th day of February, 1905, in the proceeding brought before it."

In this case then we find:

(1.) A bill to enjoin a proposed advance in rates was filed before the rates became effective, and before the Interstate Commerce Commission had jurisdiction over the subject-matter.

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(2.) A complaint to the Interstate Commerce Commission on the day following the legal establishment of the advanced rates.

(3.) An order of the Commission primarily declaring the rates as advanced to be unreasonable and unjust, and requiring the carriers to desist from their enforcement.

(4.) A petition to the Court to grant relief equivalent to the specific enforcement of the order of the Commission.

(5.) A decree of the Court concurring in the findings and conclusions of the Commission, and enjoining the enforcement of the advanced rates.

Third.

THE ADVANCE IN RATE WAS NOT THE NORMAL PRODUCT OF FREE COMPETITION, BUT WAS THE RESULT OF A COMBINATION AMONG THE CARRIERS.

In promulgating the advance the appellants acted in concert with each other and with other lumber carrying roads both east and west of the Mississippi River in pursuance of a common understanding or agreement. This understanding was arrived at and carried into effect through the medium of the Southeastern Freight Association.

Such was the finding of the Interstate Commerce Commission.

Ante, p. 15; Tr., Pt. II., p. 1021.

The Commission concludes:

"The proof shows conclusively that the advance was the outcome of concert of action and a previous understanding between the companies. Through

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ferred to a sub-committee for "recommendation" (Tr., Pt. I., p. 73). The member proposing a change shall "suggest" the same to other members directly interested, and shall file a declaration setting forth in detail the proposed rates and the effective date thereof. The chairman will compile and publish such rates, and furnish a copy to each member. He will also "docket" the matter for discussion and consideration at the next meeting (Tr., Pt. I., p. 74). Such matters shall not be discussed or considered by correspondence through the chairman's office (Tr., Pt. I., p. 74).

There are also rules for procedure at joint meetings of the Southeastern Freight Association and the Southwestern Mississippi Valley Association, for the consideration of rates affecting the territories of both Associations (Tr., Pt. I., pp. 75–79). It is provided that joint sessions shall be held every other month. The subjects to be discussed include rates applying from or through the territory of one Association into or through the territory of the other. The line desiring any change in such interterritorial rates advises the chairman of its Association, who dockets the subject for discussion "exactly as though it were a question of rates" applying between points in the same territory (Tr., Pt I., pp. 75–6). The general rate committee of this joint Association includes all of the appellant railway lines, excepting the Georgia Southern and Florida and the Macon and Birmingham Railway Companies (Tr., Pt. I., p. 78, Committee No. 4).

The facts and circumstances attending the particular advance complained of in this case show that the element of competition was wholly eliminated.

Counsel for appellants is in error when he states that if the competing lines from Arkansas had not increased their rates two cents per hundred pounds it would have been impossible for appellants to have made the advance in their rates, if he means by this to say that the inspiration for the increase and the

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actual understanding that the increase would be made effective came first from the Arkansas lines.

Mr. Powell, freight traffic manager of the Southern RailwayCompany, testified on pages 910-912 of Pt. II. of the Transcript, that *the Southern Railway was the first line which took up the question of advancing the rate.* It was brought about by the fact that the Southern Railway Company's net earnings were showing a decrease as compared with the preceding year (see also Tr., Pt. I., p. 90, Ex. No. 24). Mr. Powell was instructed by the management to go over the list of rates and advance such of them as could sustain the advance. *He determined that lumber and pig iron could bear the advance.* On January 5, 1903, he wrote to two of his general agents that the company had under consideration an advance in the rates of lumber and pig iron, stating as a reason that the operating expenses had increased so much that while the gross receipts of the company had largely increased, the net receipts for some months showed a decrease. He wrote to the officials of the Illinois Central Railroad Company asking their opinion. Before receiving a reply the rate committee met in St. Augustine on January 28, 1903, when the subject of this increase was discussed. At this meeting Mr. Powell expressed himself as confident that the Arkansas lines would make an advance, since in discussing the situation with the Traffic Manager of the Frisco System, a line operating both east and west of the Mississippi River and handling large quantities of lumber, he was advised that the western roads expressed themselves as desirous of securing more money on the lumber business.

A further conference followed on January 29th and on January 30th in New Orleans. Another meeting was held in St. Louis, when the question was again discussed by the representatives of the various lines.

Mr. Culp, of the Southern Railway Company, testified that they looked around to see where they

NG – POSSIBLE BLURRED PAGES

could best get the additional revenue, and one of the commodities which they thought would bear the advance was lumber.

Tr., Pt. II., pp. 505, 1051.

The inference from the facts in evidence is that finding other lines favorably disposed, the Southern Railway listed the subject with the Conference Committee of the Southeastern Freight Association, by which it was discussed and considered at St. Augustine on January 28, or at New Orleans on January 30, 1903, or at both.

The chairman of the Freight Association addressed to the members of the Executive Board and of the Conference Committee a communication under date of February 3, 1903, submitting a telegram from C. C. Cameron, chairman of the meeting of interested lines, which had been held at St. Louis on January 30, 1903. This telegram advised that at the meeting at St. Louis, announcements were made by all lines that an advance of two cents per hundred pounds would be made on yellow pine lumber from all producing points in Texas, Arkansas, Louisiana, Mississippi and the Southeast to Ohio and Mississippi River crossings, and points basing thereon on lowest combinations. To this telegram Mr. Parrott replied asking if announcements had been made at St. Louis by initial lines in the territory of the Southeastern Freight Association, using this significant language: "In other words, *will it be necessary for lumber originating lines in this territory to discuss or interchange views regarding the matter?*"

In a subsequent telegram Mr. Parrott suggested to Mr. Cameron that the advance be made effective on March 1st (Tr., Pt. I., pp. 99-100).

The subject was duly considered by the Conference Committee of the Southeastern Freight Association on February 12, 1903, and the Committee submitted the following "recommendation":

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"Recommended that effective March 1st, 1908, the rates on lumber from Southeastern territory to Ohio River crossings be increased two cents per hundred pounds and rates beyond made on lowest combinations, with the understanding that the question of divisions will be handled on its merits."

The Southern Railway had filed with the Southeastern Freight Association its "declaration" announcing that it would make the advance in rate effective on March 1st. This was followed by similar "declarations" filed by other lines (Tr., Pt. I., pp. 56, 57).

It transpired that some of the lines participating in the traffic were unwilling to put the advance into effect until the saw mill men could have an opportunity of filling orders already contracted for, a complete understanding not having been arrived at with respect to other matters, such as the precise territory to be affected by the advance and other matters of detail. Numerous communications followed between traffic officials of the various lines (Tr., Pt. I., pp. 34-55). It would unduly extend this argument to discuss these various communications. That finally a complete understanding in all of its details was arrived at and acted upon may be seen by reference to some of the communications, as follows, to wit:

Estes to Goodwyn	Tr., Pt. I., p.			82,	Ex. 4
Knox to various officials	"	"	"	58-59	
Parrott to Conference Committee	"	"	"	52-54	
Parrott to Cutler	"	"	"	51	
Compton to Cutler	"	"	"	50-51	
Powell to Cutler	"	"	"	51-52	
Cutler to Compton	"	"	"	85,	Ex. 11
Powell to Compton	"	"	"	90,	Ex. 24
Compton to Powell	"	"	"	102-103	
Powell to Cutler	"	"	"	50	
Smith to Powell	"	"	"	102	

G - POSSIBLE BLURRED PAGES

Winburn to Shaw	Tr.,	Pt. I.,	p.	45–6	
Dickinson to Shaw	"	"	"	47	
Powell to Conference Committee	"	"	"	43–44	
Powell to Conference Committee	"	"	"	48	
Winburn to Dickinson	"	"	"	82–83	
Cutler to Goodwin	"	"	"	86,	Ex. 13
Culp to Dickinson	"	"	"	92,	Ex. 27
Goodwyn to Parrott	"	"	"	104–105	
Parrott to Conference Committee	"	"	"	43–44	
Barr to Dickinson	"	"	"	88,	Ex. 20
Thomas to Dickinson	"	"	"	87,	Ex. 18
Goodwyn to Cutler	"	"	"	42–43	
Goodwyn to Neil	"	"	"	104	
G. F. A. to Neil	"	"	"	41	
Menzies to Neil	"	"	"	103	
Goodwyn to Washburn	"	"	"	105	
Neil to Cutler	"	"	"	39	
Perrin to Cutler	"	"	"	39	
Estes to Goodwyn	"	"	"	83	
Menzies to Goodwyn	"	"	"	81	
Estes to Goodwyn	"	"	"	84	
Culp to Hines	"	"	"	92–93,	Ex. 25
Compton to Powell	"	"	"	101	
Culp to Hines	"	"	"	93	
Hines to Culp	"	"	"	97	

That there was no real competition between the roads in the Southeastern Freight Association is manifest also from the publicly known "system" control of all, or nearly all, the defendant roads. They belong to and are controlled by the same "group" of railway managements, and of this as a matter of common knowledge, we think judicial notice may be taken.

Johnson: Am. Railway Transportation, p. 62.

BOOK TOO LARGE FOR FILM

Mr. Samuel Spencer, who was President of the Southern Railway at the time of the transaction complained of, was also President of the Georgia Southern & Florida Railway Company, and a director of the Central of Georgia Railway Company. The Southern Railway Company holds in its own name $1,175,000 par value of the capital stock of the Georgia Southern & Florida Railway Company (Tr., Pt. I., p. 194), out of a total of $2,768,000 (Tr., Pt. I., p. 192).

It is perfectly apparent that the advance in rates complained of was instigated by the Southern Railway in its search for an increase of revenue, and was accomplished by means of a complete understanding with other railway companies, all acting in concert to bring about the advance in the same amount and on the same day. The very fact that certain railway companies, not affected by the temporary restraining order, withdrew or suspended the advance upon the issuing of that order, emphasizes the existence and observance of a common understanding and intent. This is further shown by the additional fact that after the dissolution of the restraining order all of these roads put the advance into effect on the same day.

Tr., Pt. I., pp. 96, 97.

Counsel for the appellants does not deny that there was a common understanding and a concurrence of action on the part of the carriers, his insistence being that such concurrence and understanding does not signify an illegal combination in restraint of trade.

It is well to bear in mind that *Carrier Competition* differs from *Market Competition*. The later exists entirely independent of the carriers. If spruce, fir and white pine, serving substantially the same uses as yellow pine, can be purchased in Chicago for a less price than Georgia pine, it is plain that Georgia pine cannot find a market in Chicago, unless its cost can be reduced. If the transportation companies

NG – POSSIBLE BLURRED PAGES

desire to carry the Georgia product to the Chicago market, they must co-operate with the lumber manufacturers and establish a rate under which the traffic can move. So if Arkansas yellow pine can be delivered in the territory on and beyond the Ohio River at a less price than Georgia yellow pine, the Georgia product cannot enter in competition. Either the price of the Arkansas product must be increased or that of the Georgia product reduced. Not only must the Georgia producer make a close price on his lumber, but a favorable rate of freight must be given. The extent to which the carrier figures in this proposition is illustrated by the fact that the *average rate of freight on much of the lumber from Georgia points to western markets exceeds the value of the product at the mills* (Tr., Pt. II., p. 1029).

A rate adjusted to meet these conditions responds to market competition.

Carrier competition is quite different. That consists in competition of one carrier with another serving the same territory. The natural, direct and immediate tendency of competition is to lower rates (Joint Traffic Association case, 171 U. S., 577; If rates are made or advanced by a common understanding and concurrent action, it cannot be said that carrier competition comes into play. Competition cannot enter into the production of a rate created by agreement or understanding between all of the carriers serving the same territory and transporting the same commodity.

The competition which the law contemplates will produce reasonable rates, is that which would naturally exist between carriers *in the absence of a joint agreement*. Whatever else may be said of rates that result from a common understanding, it is quite clear that they are not entitled to the presumption of reasonableness that attaches to rates which are the outcome of real carrier competition.

Market competition limits the rate only to a charge under which the traffic will move. A rate

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so established may be unreasonably high or unreasonably low.

It may be argued that carrier competition is impracticable, and would bring about such cutting in rates as would demoralize business and destroy the investment in railroad properties. This may or may not be true; but its very statement demonstrates the utter absence of carrier competition, and deprives the appellants of all the force of their argument that the rates are reasonable because they are the product of competition.

Appellees insist that the contrary presumption obtains; and that when rates are made or advanced in pursuance of agreements and understandings which defeat carrier competition, the presumption is that they are unreasonably high.

"Competition will itself bring charges down to what may be reasonable" (U. S. *v.* Freight Association, 166 U. S., 341); but the absence of it removes the most wholesome restraint and enables the carriers to indulge that vicious tendency of making a rate as high as the traffic will bear.

Fourth.

REASONABLE COMPENSATION FOR THE SERVICE RENDERED IS ALL THAT THE CARRIER MAY EXACT FROM THE PUBLIC. A REASONABLE AND COMPENSATORY RATE MAY NOT BE INCREASED BECAUSE THE CARRIER IS IN NEED OF ADDITIONAL REVENUE, AND THE TRAFFIC WILL BEAR THE ADVANCE.

In discussing the business of transportation Judge Brewer said, in Chicago, etc., R. Co. *v.* Osborne, 52 Fed., 912, at page 914:

"That business, though of a quasi-public nature, and therefore subject to governmental regulation, has, as a matter of fact, been carried on by private

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capital through corporations; the fact that it was a quasi-public business always prevented the owners of capital invested in it from charging, like owners of other property, any price they saw fit for its use. A reasonable compensation was all they could exact, and he who felt aggrieved by a charge could always invoke the aid of the courts to protect himself against it."

In the case of Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 167 U. S., 479, the Court said that Congress left with the railway companies "the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of commerce carriers, to wit, the rates must be reasonable."

In Smyth *v.* Ames, 169 U. S., 466, it was said that the public had a right to demand that no more than the reasonable value of the services be exacted from it.

The public interest is paramount. The value of the service to the customer constitutes the limit of charge which the company is permitted to make. A corporation operating a public highway is not entitled to exact unreasonable charges in order that stockholders may earn dividends.

Beale & Wyman Railroad Rate Regulation, § 503, and cases cited in Note 5.

Covington, etc., Co. *v.* Sandford, 164 U. S., 578.

The rates in force prior to the last advance were remunerative to the carrier. It is admitted by the appellants in their answer to the bill that the previous rate yielded "some profit" to the carrier (Tr., Pt. I., p. 212). The Commission found that the carriers did not attempt to justify the advance on the ground that the existing rate was unremunerative, but on the ground that the carriers were entitled to share in the prosperity of the lumber busi-

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ness (Tr., Pt. II., p. 1048). On this point the Circuit Court used the following language:

"The cardinal error to which the railroads have been committed in this important controversy is the apparent belief that they have the right, by arbitrarily increasing freight rates, to divert at any time to their own treasuries a share of the profits of successful industries or occupations. It was not contended that the antecedent rates were unremunerative. As before stated, they were conceded to be profitable. That additional revenue was needed to meet increased expenses was the motive of the advance was testified by Vice-President Culp, of the Southern Railway. To quote his language, they 'looked about to see where' they could best, but without injury, get that additional revenue, and one of the commodities which they thought would 'bear an advance' was lumber."

Tr., Pt. III., pp. 1214-5; 138 Fed. Rep., 763.

If some profit is derived from this traffic, it is inevitable that the revenue therefrom exceeds the cost of the service. How great or how small this profit is, the railway companies, who are alone in position to know, fail to bring out in the evidence. Hence it is fair to conclude that the previously existing rates were compensatory.

To predicate the conclusion that a particular rate is too low the carrier must show the cost and value of the service. In the effort to comply with this requirement Mr. Menzies, of the Atlantic Coast Line, states that while lumber constitutes 22 per cent. of the tonnage of that company it yields only 15 per cent. of the revenue (Tr., Pt. II., p. 892). Mr. Culp, of the Southern Railway Company, says that while the average receipts per ton per mile of his road are 9 1/2 mills, and the average cost of operation is 7 mills, the lumber traffic from Georgia points to the Ohio River pays only 5 mills per ton per mile (Tr., Pt. II., p. 469).

POSSIBLE BLURRED PAGES

In the case of Minneapolis & St. Louis Rd. Co. *v.* Minnesota, 186 U. S., 257, it appeared that the Railroad Commission of Minnesota had ordered a reduction in through rates on hard coal in carload lots from Duluth to interior points. The railway company contended that if the percentage of reduction should be applied to all its business within the State it would not be able to earn operating expenses. This contention was founded upon the proposition, similar to that advanced in the case at bar, that the reduced rate on hard coal would be less than the average percentage of operating expenses. The Supreme Court said that the difficulty with the defendant's case was that it made no attempt to show the cost of carrying coal in car load lots; and after pointing out that coal belongs to one of the lowest classes of freight, and after recognizing the difficulty of determining the cost of transportation of one segregated commodity, the Court continued:

"The charges for the carriage of freight of different kinds are fixed at different rates according to their classification; and this difference, presumably at least, is gauged to some extent by a difference in cost of transportation as well as the form, size and value of the packages and the cost of handling them."

The great bulk of the lumber shipped to the central west is of low grade and constitutes perhaps the lowest class of freight moving long distances in large quantities (Tr., Pt. I., pp. 170-171; Pt. II, pp. 296, 323, 338 and 446). The rate on lumber is fixed without respect to the grade, and hence bears more grievously on low grade lumber than on the higher priced product. It is not to be expected that the rate per ton per mile should be as great as upon high class commodities of less bulk and greater value, much of it moving short distances and taking higher local rates. The rate on lumber bears no just comparison with that upon fruits, pyroligneous

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products, cotton seed oil and cotton factory products. As was said by the Commission:

"Important among the controlling factors in fixing rates are value, volume, risk and cost of handling. The rates are per hundred pounds or, in other words, based on weight. Lumber is much less valuable per weight than most, if not all, the above articles, and its volume is many times greater. The larger portion or nearly all of the above articles are what are termed perishable, and, therefore, involve greater risk and greater cost in handling than lumber. The rates on lumber, therefore, should be not only not as high as, but materially less than, the rates on those articles. The rate on lumber prior to the advance appears to have been a reasonably high rate when compared with the rates on other commodities which are at all analogous to lumber in respect to value, volume, risk, cost of handling and the various other circumstances and conditions affecting the transportation of traffic."

Tr., Pt. II., p. 1053.

It is submitted that if, as stated by Mr. Menzies, lumber constitutes 22 per cent. of the tonnage of the Atlantic Coast Line and yields 15 per cent. of the revenue, the proportion is at least fair and should be satisfactory to the carrier. Mr. Culp's proposition that the average rate per ton per mile on lumber from Georgia points to Ohio River crossings is less than the average cost of operation, is likewise untenable, because low grades of freight may be profitably carried at rates less than the average rate of operating expense (186 U. S., 257). The statement of Mr. Capps that the lumber traffic of the Seaboard Air Line Railway from Georgia points to Ohio River destinations is the least profitable business handled by the Seaboard Air Line Railway, is greatly qualified by the facts brought out in his own testimony. It is apparent that he is referring only to lumber shipments delivered by his line to connections at

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Montgomery. He testified that the average earnings per ton per mile on lumber from Georgia points to Ohio River destinations is 5 3/10 mills. The earnings on lumber to New York and the eastern cities (which rate has not been increased) is 5 mills. The earnings on the tonnage via Montgomery is 4 4/10 mills per ton per mile.

Tr., Pt. II., pp. 852, 855–863.

The route via Montgomery constitutes a long haul over which the rate per ton per mile is necessarily less than on the same rate over the short line. If the Seaboard Air Line prefers to route the shipments via Montgomery in order to get an interchange of tonnage at that point, it is entirely fair to presume that the Seaboard Company finds it to its interest to do so. It could obtain 20 per cent. more per ton per mile by transporting the lumber over the short line.

A consideration of the most important factors which control in the fixing of rates as stated by the Commission will show that the rate prior to the last advance afforded full compensation for the service performed.

The average value at the mill of the grade of lumber principally shipped to the central west was less than the freight charges to destination.

Tr., Pt. II., p. 1029.

During the year 1902 the Garbutt Lumber Company shipped to Ohio River points and beyond lumber of the value at the mill of $22,008.70. The freight charges paid thereon were $25,885.58. The total freight charges thus exceeded the value of the total shipments by $3,876.80. During the month of March, 1903, this Company shipped to Ohio River destinations 14 cars of lumber, for which it received at the mill $1,026.15. The freight charges amounted to $1,218.67, or an excess of $192.52 over the value (Tr., Pt. II., p. 296). A detailed statement of these shipments during March, 1903, will be found at

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page 316 of the Transcript, Pt. II., Exhibit 4, to Mr. Garbutt's testimony. Mr. Evans states that the freight charges about equal the value at the mill on shipments made by J. S. Betts & Company (Tr., Pt. II., p. 339). Sixty per cent. of the lumber manufactured by the mills in which Mr. Ensign is interested is of low grade stock, the freight upon which to Ohio River territory is greater than the value at the mills, as shown by a detailed statement (Tr., Pt. I., p. 168). The testimony of Mr. Green, of the Southern Railway, does not conflict. The exhibit filed by him refers to only selected shipments over the Southern Railway, and does not represent either the whole movement or the average. He prepared a statement of 44 selected cars moving in March, 1903, which showed that the total freight charges were $5,823.83, and that the invoice value was $7,432.98, or $1,609.15 in excess of freight charges (Tr., Pt. II., p. 541). On page 559, Pt. II., of the Transcript Mr. Green explains his testimony by saying that in selecting 45 cars of lumber shipped from Georgia points to Ohio River destinations out of more than 600 which moved during the time, he only intended to show that *much* of the lumber exceeded the freight charges in value, and that not *all* exceeded such charges in value. The Commission in its finding points out the fact that the value per thousand feet of the lumber contained in these selected 44 carloads was much above the average value of low grade lumber at the mills. (Tr., Pt. II., p. 673). The Commission found as a fact "That on many low grade classes of lumber shipped from Georgia to the West the freight charges exceeded the value at the mill," and further said:

"The witness for the defendants named other commodities the freight charges on which are greater than the value of such commodities at the point of shipment; for instance, coal, brick, lime, cement, some kinds of clay, building stone, crushed stone, certain ores, cinders, slag, gravel, sand and saw dust. On no other article of as much value

S – POSSIBLE BLURRED PAGES

and of as great utility as lumber do the freight charges exceed the value at the point of shipment."

Tr., Pt. II., pp. 1029-30.

The tonnage of lumber is greater than that of any commodity transported by the appellants, except bituminous coal.

The Commission found as a fact that the tonnage of lumber hauled by the appellants is very large in proportion to that of other commodities, largely exceeding that of any other commodity except bituminous coal, and that it is many times greater than the tonnage of the principal products of Georgia and the South, such as cotton, fruits, vegetables and naval stores (Tr., Pt. II., p. 1034). On the same page of the Transcript the Commission gives the following table made up from the reports of the appellants to the Commission for the years 1901, 1902 and 1903:

Total Freight Tonnage Reported by the Defendant Roads as originating on Their Lines and as Received from Connecting Roads and Other Carriers.

Commodity.	1901. Whole Tons.	1902. Whole Tons.	1903. Whole Tons.
Grain	2,653,711	2,298,034	3,082,147
Flour	926,203	1,025,319	1,317,908
Other Mill Products	418,511	392,867	510,390
Hay	457,130	384,294	520,051
Tobacco	315,150	305,934	365,146
Cotton	995,144	1,140,766	1,274,727
Fruit and Vegetables	611,473	638,626	883,458
Anthracite Coal	61,330	172,620	30,614
Bituminous Coal	9,490,692	11,340,596	12,417,636
Naval Stores	399,691	403,380	681,863
Iron, Pig and Bloom	1,416,564	1,767,129	1,901,929
Iron and Steel Rails	454,546	529,059	604,365
Cement, Brick and Lime	1,280,622	1,417,113	1,774,604
Agricultural Implements	64,995	68,038	65,453
Wagons, Carriages, Tools, &c	60,992	57,924	58,175
Wines, Liquors and Beers	227,687	245,300	286,771
Household Goods and Furniture	101,605	123,103	149,586
Merchandise	2,409,379	2,586,341	2,078,539
Lumber	6,566,407	7,158,122	9,808,463

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From this table it appears (taking the figures for the year 1903) that the tonnage of lumber is three times greater than that of grain, eight times greater than that of cotton, nearly eight times greater than pig iron, and more than ten times greater than fruits and vegetables.

Not only was this tonnage very great, but it was rapidly increasing and was constant in its movement. The tonnage in 1901 was 6,566,407 and in 1903 was 9,808,463, an increase of 3,242,056, or within a fraction of 50 per cent. in two years. The traffic is constant throughout the year and does not depend upon seasons, as do shipments of cotton, fruits, vegetables, and like products.

Tr., Pt. II., p. 340.

The risk of loss or injury in transit is so slight as to be almost inappreciable.

Lumber is neither fragile nor perishable, so that in a wreck it is practically exposed to only one danger, that of fire. It is not subject to loss by waste, theft or exposure to weather. The evidence discloses that a claim for damage to lumber is of such exceedingly rare occurrence that witnesses who have been engaged in the business for many years have not made a single claim.

Tr., Pt. I., pp. 170; Pt. II., 300, 424.

The Commission found that "there is little or no risk incident to its carriage and in case of accidents the damage is, as a rule, insignificant."

Tr., Pt. II., p. 1043.

The service is inexpensive and cost of handling is relatively small.

For the movement of 60 per cent. of the lumber naked or flat cars are furnished. This is the cheapest grade of cars that is used.

Tr., Pt. II., pp. 323, 410, 423.

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The shipper is required to equip these flat cars with standards and braces according to the rules of the Master Car Builders' Association, at an expense of approximately $3.50 each. Freight on the additional weight of this shipment is charged, entailing a further expense of from $2.00 to $3.00 per car. These standards and braces are not returned to the shipper, nor is their value accounted for by any one, so that for each car shipped a new equipment is required.

Tr., Pt. II., pp. 324, 336, 340, 342, 346, 410, 425, 999, 1001.

The cars are loaded by the shipper and unloaded by the consignee without cost or expense to the carrier.

Tr., Pt. II., p. 346.

The cars are loaded more nearly to their stenciled capacity than in the case of most other commodities (Tr., Pt. II., pp. 300, 363, 424, 425, 346, 1041). The loading is less than that of such heavy articles as stone, coal and iron, but is greater than that of such commodities as cotton seed meal, fertilizers and cement. The percentage of loading of various commodities is stated by the Commission at pages 1042 and 1043, Pt. II. of the Transcript.

The traffic is regular and constant, requiring no special movement at any particular season, as in the case of many other Southern products. Rapidity of transportation not being required, the movement is made at the convenience of the carrier.

Tr., Pt. II., pp. 346, 1043.

Lumber is an article of prime utility and should be accorded the lowest rates consistent with fair compensation to the carrier for the service of transportation.

The production of long leaf yellow pine lumber is confined to a narrow strip of territory skirting the coast from the Carolinas to Texas. The de-

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mand of the local or nearby markets is quickly supplied and is comparatively inconsiderable. The great bulk of the product must find its way to more distant markets. It is in the interest of the public that a commodity of such great practical utility should be permitted to move freely and on favorable rates. Otherwise interstate commerce is restricted and to that extent the value of the Southern pine forests is depreciated, while the public in other parts of the country are denied the benefits to be derived from the use of such lumber. In its last analysis the consumer pays the freight. If the freight charges, added to the cost of manufacture, do not admit of some profit to the producer and the dealer, it is plain that lumber will not move to such markets, and competition will be defeated.

Such has been the history of this case. Prior to 1890 the rates on lumber from Georgia points to Ohio River destinations were so high as to amount to prohibition. On November 28, 1891, the difference in rate between box cars and flat cars was abolished, and the rate to Cairo on shipments destined to points beyond was reduced from 20 to 17 cents a hundred pounds. This reduction was not sufficient to invite the movement, and on July 16, 1893, the rate was reduced to 16 cents. In order to stimulate the movement a further reduction was found necessary, and on May 17, 1894, the rate was made 13 cents.

Tr., Pt. II., p. 1026.

It is to be observed that the rate to Cincinnati, the natural gateway from Georgia points to the Buffalo-Pittsburg zone, has never been reduced, but has been constantly increased, except that in 1891 the difference in rates between box cars and flat cars was abolished. In 1887, when the rate per ton per mile on traffic generally was much higher than now, the rate from Group 2, Southern Railway, to Cincinnati was 20 cents. This rate continued with-

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out reduction until in 1894 it was increased to 21 cents and by the last advance was increased to 23 cents.

Tr., Pt. II., p. 1026.

The present rate, including the advance, from the groups of the Georgia Southern and Florida Railway Company to Cincinnati varies from 24 to 27 cents; from Atlantic Coast Line it varies from 23 to 26 cents; while from Southern Railway groups it varies from 23 from Group 2 to 26 cents from Group 5.

Tr., Pt. II., p. 1022-23.

The greater part of the traffic of lumber to the central west moves through Cincinnati, the short line, notwithstanding that the rates are based on Cairo.

Tr., Pt. II., p. 388.

Mr. Stillwell's old firm of D. C. Bacon & Company was the pioneer in reaching out for Western business. The field was exploited by personal solicitation and selling sample cars. A demand for Georgia lumber was thus created, but the rates of freight were so high that even this limited demand could not be profitably supplied in competition with other woods. After continued and persistent appeals to the railway companies, rates were finally established which permitted the movement. Under these conditions investments were made in machinery adapted to the manufacture of the kind of lumber required, business relations were established and a considerable traffic ensued.

Tr., Pt. III., p. 1197.

Mr. Compton's statement that there was a movement of lumber under the old rate does not conflict with the evidence that there was no such movement from Georgia points. The Louisville and Nashville Railroad, represented by Mr. Compton, served Ala-

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bama and Mississippi, which had lower blanket rates under which there was a movement from those States to and beyond Cairo.

This rate of 13 cents from Georgia points continued in effect for more than five years, until September 8th, 1899, it was increased to 14 cents. On June 22d, 1903, the last advance of two cents was made, making the rate 16 cents from Southern Railway Group No. 2 and from 1 to 7 cents higher from other groups of Georgia. The 16 cent rate applies only from Southern Railway Group 2, affecting points between Macon and Brunswick. From this territory little or no lumber moves. The rate from other groups in Georgia is from 1 to 7 cents higher. Thus from Southern Railway Group No. 3 the rate to Cairo and beyond is 17 cents; from Group No. 4, 18 cents; from Group No. 5, 19 cents. From Georgia Southern and Florida groups the rates are: No. 1, 17 cents; No. 2, 18 cents; No. 3, 19 cents; and No. 4, 20 cents. From Atlantic Coast Line groups the rates are: No. 1, 20 cents; No. 2 and No. 3, 21 cents; No. 4, 22 cents; and No. 5, 23 cents.

Tr., Pt. II., p. 1023.

The flat or blanket rate from all points in Mississippi, Louisiana, Arkansas and part of Alabama to Cairo is 16 cents.

Tr., Pt. II., p. 1023.

The average rate from the Georgia groups mentioned is 19 1/6 cents, while the average for the several road groups is:

Southern, 17.5 cents.
Georgia, Southern and Florida, 18.5 cents.
Atlantic Coast Line, 21.5 cents.

Under this advance the movement was suddenly and violently checked and the business demoralized. The shipments of the Hetler Lumber Company to these western markets declined 40 per cent (Tr., Pt. II. pp. 251, 1027) Those of the Garbutt Lumber

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Company declined nearly 59 per cent. (Tr., Pt. II., pp. 297-298, 1027). Those of the Stewart Lumber Company declined 50 per cent. (Tr., Pt. II., pp. 321-322, 1028), and those of the companies represented by Mr. Ensign declined from 17 1/2 to 50 per cent. (Tr., Pt. II., pp. 385-386). The testimony showed a material falling off in shipments from other mills throughout Georgia (Tr., Pt. II., pp. 337, 339, 361, 398, 325).

In its findings of fact the Commission points out the reduction as shown by the records of the railway companies:

"Shipments of lumber from stations on Central of Georgia Railway to points on and north of the Ohio River in October, 1902, and 1903, were as follows:

To points on and north of Ohio River.

1902.

Box cars	6,496
Flat cars	2,873

1903.

Box cars	6,263
Flat cars	1,854

"This shows a falling off in 1903 to the extent of 233 box cars and 1,019 flat cars.

"In October, 1902, there were shipped from Georgia points via the Atlantic Coast Line Railroad to the Ohio River points and points north, 27,509,250 pounds of lumber, and in the same month in 1903, 16,475,910 pounds, a decrease of 11,033,340 pounds.

"In October, 1902, the Seaboard Air Line Railway transported from Georgia points consigned to the Ohio River points and beyond 98 carloads of lumber, and in 1903, 61 carloads, a decrease of 37 carloads."

Tr., Pt. II., p. 1028.

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The effect of this advance in rate was not only to materially impair the western demand, but also to demoralize the general business of the lumber manufacturers by throwing coastwise the product intended for western shipments (Tr., Pt. II., p. 322). The manufacturers had installed machinery specially adapted to the production of the low grade lumber required in western markets and had adjusted their purchase and use of timber with relation thereto (Tr., Pt. II., p. 403). It was necessary that this low grade lumber should somewhere find a market, even at reduced prices. The result, as found by the Commission, was an increase in the shipments to eastern markets, to which no advance in rate had been made.

Tr., Pt. II., p. 1028.

Fifth.

THE ADVANCE CANNOT BE JUSTIFIED ON THE GROUND THAT THE RATE PER TON PER MILE IS LESS THAN THAT OBTAINING BETWEEN SELECTED POINTS.

Very little of the Georgia lumber destined to points beyond the Ohio River actually moves through Cairo. The bulk of this traffic moves through Cincinnatti, which is the natural and nearer gate-way. Many of the rates are based on Cairo because that rate represents the lowest combination. The mileage via Cairo to much of the territory concerned is greater than the actual mileage employed via Cincinnati. If the rate from Georgia points to Detroit is calculated upon the basis of the greater mileage by way of Cairo rather than the actual mileage by way of Cincinnati, it is evident that the Cairo route will show a less rate per ton per mile than the route actually used through Cincinnati.

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It is further evident that if the proportion of the rate accepted for the long haul to Cairo is taken as a basis of calculation, and the higher rate for the shorter haul north of the river be not considered, the rate per ton per mile will be shown to be less than the actual rate from point of origin to point of destination.

The learned counsel for appellants has adopted this basis of calculation, by which he shows that the rate per ton per mile from Group 2 of Southern Railway to Cairo is only 4.33 mills per ton per mile In arriving at this result he adopts the rate applicable to a group from which little or no lumber moves, and which is from 1 to 7 cents a hundred pounds less than rates from other groups in Georgia which actually originate the lumber traffic. Should the calculation be made on short mileage basis, say from Georgia Southern and Florida Railway Group 4 (the rate from which to Cairo is 24 cents) a very much higher rate per ton per mile would be afforded, and especially would this be true if the entire through rate be considered from the point of origin to point of destination.

As was said by the Commission:

"If the allowances to the originating roads are unreasonably large, as they appear to be from a distance standpoint, and result in unreasonably low proportions to the other roads, this cannot be remedied by an advance in the total through rates *charged the public*. It is the total rate, and not its proportions, which is in issue."

Tr., Pt. II., p. 1054.

In point of fact, through rates from Georgia points which originate the lumber traffic to Ohio River destinations and beyond, calculated on short mileage, is not less per ton per mile than that normally prevailing elsewhere.

The testimony of Mr. Compton, of the Louisville and Nashville Railroad (Tr., Pt. II., pp. 671, 763),

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shows that the average rate per ton per mile from 26 selected points of origin in Georgia to 38 selected points of destination in Ohio, Indiana, Pennsylvania and New York, yields an average rate of 6.21 mills per ton per mile for an average haul of 906 miles, short line mileage.

The comparisons invoked by Mr. Compton fail to support the argument that this rate does not afford even more than adequate remuneration for the service performed. From this testimony it appears that for the short haul north of the river averaging 317 miles the carriers are satisfied with 6.91 mills per ton per mile, which is only slightly more than the rate afforded to the carriers for the long haul south of the river. On the same hypothesis as that assumed by Mr. Compton in this comparison the highest rates obtained by the originating lines south of Macon for the short haul would justify a similarly high rate per ton per mile for the long haul from Macon to the Ohio River. The Commission in its findings of fact says:

"The amounts or divisions allowed the originating roads are large in proportion to the lengths of the hauls made by them and in proportion to the balances of the rates left for the intermediate roads. For example, the Southern Railway allows the lines south of Macon from 5 1/2 to 7 1/2 cents out of the rate to the Ohio. This leaves as the proportion of the Southern out of the 16 cent rate from Group 2 to Cairo from 8 1/2 to 10 1/2, which yields a comparatively small rate per ton per mile. The rate per ton per mile, however, under the total rate to the river, which is the rate the shipper has to pay, is materially higher."

Tr., Pt. II., p. 1025.

Mr. Compton shows that the rate per ton per mile from selected points in the central west to New York City, an average distance of 911 miles, is 5.6 mills (Tr., Pt. II., p. 674), or only 6 points less

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than the rate for a similar distance from the selected Georgia points to Ohio River destinations? With respect to this comparison it is important to note that white pine, spruce and fir, that constitute the movement of lumber from the west to New York, are much *lighter in weight* than yellow pine, so that the rate *per thousand feet* (the measure of lumber values) is materially less than on the Georgia lumber. This observation is equally applicable to the rate of 6.03 mills from shipping points in Minnesota and Wisconsin to Chicago. The average haul represented in this last comparison is only 359 7/10 miles as against the long haul of 906 miles from Georgia which yields 6.21 mills per ton per mile (Tr., Pt. II., pp. 657, 743).

Mr. Cantrell, a former railroad freight agent, in his testimony replies to some of the contentions of Mr. Compton. He says that the shipments from the selected points in Georgia to western destinations are not representative, for that Mr. Compton selected many points located on the Ohio River and other points taking comparatively low rates, and that he showed but few shipments to Detroit and other points to which the bulk of the business from Georgia moves, all taking a much higher rate than most of the points shown by Mr. Cameron (Tr., Pt. I., p. 163). Mr. Cantrell also points out other evidence of unfairness in Mr. Compton's testimony.

We cannot undertake to answer specifically and in detail each of the illustrations given by Mr. Compton and Mr. Green without unduly extending this argument.

The instances and illustrations given by Mr. Green, of the Southern Railway, are even less apt than those of Mr. Compton. There is an utter absence of evidence tendingto show that circumstances and conditions in the far west, the territory resorted to by Mr. Green, are at all similar to the circumstances and conditions obtaining in the south-

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east. In default of such a showing comparisons made by Mr. Green are devoid of any evidentiary value whatever. There is nothing to indicate that there is any regular movement of lumber from Spokane, Wash., to Glasgow, Montana, or from Council Bluffs, Iowa, to Rawlins, Wyoming, or from Seattle, Wash., to Shelby Junction, Montana, or from Chicago to Pierre, South Dakota, or between any of the other points mentioned by Mr. Green (Tr., Pt. II., pp. 543, 611). It is well recognized that if there is no substantial movement of a commodity between particular points, the rate is merely a paper rate and bears no just relation to what may be a proper charge for similar distances for a large and constant traffic.

The learned counsel for appellants complains that the Commission did not find the facts testified to by Mr. Green. We submit with deference that perhaps the Commission failed to find such facts material to any inquiry properly involved in the case. If the Commission should be required to set out every primary fact disclosed by the evidence, the report of the Commission would consist of a mere statement of the evidence instead of findings of fact. Such a report from the Commission would be of very little value, and would not accord with the intentions of Congress.

We join the learned counsel for appellants in invoking the rule as stated in Cotting *vs.* Stock Yards Co., 183 U. S., 97: "That in the absence of testimony to the contrary a customary charge should be regarded as reasonable." The Court quotes from Gunning on Law of Tolls as follows:

"Long usage and acquiescence in any one uniform payment of toll is undoubtedly cogent evidence that it is reasonable."

The Court was referring to a customary charge for a particular service and not to comparative charges made elsewhere under conditions not shown to be similar. We submit that this authority sup-

ports the proposition that a rate long in force and voluntarily acquiesced in by the carrier is reasonably high.

Sixth.

THE ARGUMENT THAT THE SELF INTEREST OF THE CARRIERS WILL KEEP THE RATES REASONABLY LOW IS UNTENABLE.

The Supreme Court has declared that "In the very nature of the case, therefore, railroads are monopolies" (Tex. & Pac. R. Co. *v.* Interstate Com. Com., 162 U. S., 197).

In the absence of legal restraint the irresistible tendency of all monopoly is to demand as much for the thing or service as can be exacted. If enlightened self interest would serve to keep charges fair and reasonable, monopoly would not wear so horrid a front, and much of the argument against it would be destroyed. If the proposition announced by the learned counsel for the appellants is true, then from time immemorial the common law inhibition against unreasonable charges on the part of common carriers has been useless, and the creation of railroad commissions by the several States and by Congress cannot be justified.

The carriers' definition of a reasonable rate cannot be accepted. From the standpoint of the transportation company a test of reasonableness is whether the rate is such as will permit the traffic to move.

This is but another statement of the vicious doctrine that the carrier may impose a rate as high as the traffic will bear.

Closely related to this contention is another advanced by the appellants that they have the right to share in the supposed prosperity of the lumber producer on the theory that such prosperity is evidence that the traffic will bear an increased rate.

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These contentions were considered and disposed of both by the Commission and by the learned Court below. We quote from the report of the Commission as follows:

"It is clear that if a rate on an article of traffic is already remunerative, the increased prosperity of the business of manufacturing that article is no ground for an advance of the rate. The claim to the contrary on the part of the carriers is based upon the erroneous assumption, so prevalent among traffic managers, that a rate may be made as high as the traffic will bear. On this point we quote what was said by us in the case of *The Central Pine Association* v. *Illinois Central Railway Company et al.* (10 I. C. Rep., 505):

" 'The test of the reasonableness of a rate is not the amount of the profit in the business of a shipper or manufacturer, but whether the rate yields a reasonable compensation for the services rendered. If the prosperity of the manufacturer is to have a controlling influence, this would justify a higher rate on the traffic of the prosperous manufacturer than on that of the less prosperous. The right to participate in the prosperity of a shipper *by raising rates* is simply a license to the carrier to appropriate that prosperity, or, in other words, to transfer the shipper's legitimate profit in his business from the shipper to the carrier."

"The carriers necessarily and justly participate in the increased prosperity of their patrons in the resultant enlargement of their own business."

Tr., Pt. II., p. 1048.

The Court below declares this contention to be a "cardinal error," and refers to the opinion of Mr. Justice Brewer in Chicago & Northwestern R. Co. *v.* Osborn, 52 Fed., 914, wherein it was declared "that reasonable compensation for the service actually rendered is all that the railroad is permitted to exact."

The Court also quotes from Smyth *v.* Ames, 169 U. S., 466: "That the carrier may not fix its rates with a view solely to its own interest and ignore the rights of the public."

Tr., Pt. III., p. 1216; 138 Fed., 763.

In the absence of any real carrier competition, and in the presence of concert of action resulting from a common understanding, it would be exceedingly dangerous to commit the rights of the public to the self-interest of the railway companies, acting upon the principle that a rate may be as high as the traffic will bear.

Seventh.

THE INCREASE IN THE COST OF THE SERVICE OF TRANSPORTATION HAS NOT BEEN AS GREAT AS THAT IN THE COST OF PRODUCTION OF LUMBER.

The actual cost of transportation has decreased because of improved roadways and superior equipment which enable the carriers to more economically transport the largely increased tonnage with greater dispatch, with longer trains and more capacious cars. This is evidenced by the fact that the rate per ton per mile on traffic generally has steadily decreased.

It is true that the cost of material and labor employed in the construction and in the operation of trains has increased; but this is compensated for by the greatly increased tonnage. It is apparent that a train of 35 cars can be moved at a cost not materially greater than a train of 20 cars, the only increased items of expense being coal, and the wear and tear to roadbed and equipment. This is strongly illustrated by the fact that notwithstanding that the rates on traffic in general have decreased 20 per

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cent. in recent years both gross and net earnings have steadily and greatly increased.

The cost of material and supplies used by the Central of Georgia Railway Company increased on an average of 28.72 per cent. from 1897 to 1902.

Tr., Pt. II., p. 840.

The cost of the production of lumber has increased in greater proportion with no corresponding compensation from the greater volume of business.

A larger volume of business does not decrease the cost of the manufacture of lumber. This is shown by Mr. Garbutt's testimony. The value of the lumber shipped by his company in 1902 was $7,775.88 in excess of that shipped in 1891. The net earnings for 1902 exceeded those for 1901 only $616.95. This represented net earnings of only a little more than 1 per cent. on the additional capital required (Tr., Pt. II., p. 299). Mr. Garbutt testified (p. 299) that the cost of feed for stock had increased since December, 1900, 41 per cent., and that the cost of timber increased 200 per cent., while the increase in prices of lumber was only 12 per cent.

Mr. H. M. Ensign shows that since 1899 there have been the following percentages of increase in prices of items entering into the cost of the manufacture of lumber:

Relaying steel rails	80 per cent.
Hay	48 per cent.
Corn	31 per cent.
Cotton seed hulls	47 per cent.
Oats	44 per cent.
Labor	15 to 20 per cent.
Timber	250 per cent.
Mill supplies	20 to 80 per cent.

The increase in the cost of manufacturing the lumber, not including the increase in cost of timber, averages more than 40 per cent. The selling price of the company's product for the same time had in-

LMING – POSSIBLE BLURRED PAGES

creased only 24 1/2 per cent. Thus the increase in the actual cost of manufacture exceeded the increase in the selling price by 75 per cent.

Tr., Pt. I., pp. 174–75.

For other testimony relating to increased cost in the production of lumber see Graham, Tr., Pt. II., p. 322; Evans, p. 343; Tift, Pt. I., p. 428; pp. 179, 181–2, 367; Pt. II., pp. 1108, 1201.

These facts and figures demonstrate that the increased cost in the manufacture of lumber exceeded both the increase in the selling price and in the cost of transportation; when we consider the increase in the cost of the standing timber, amounting to at least 200 per cent., the disparity is enormous.

The quotation of prices in local markets does not represent the selling price of the lumber at the mills. Mr. Stillwell says that such market quotations are the result of local conditions and combinations; that he has known lumber of the same grade to be selling in Savannah at $18 per thousand and at the same time in Atlanta at from $12 to $14 per thousand; and that these rates are fixed, not so much on the cost at the points of production as on the local demand, local supply and the amount the consumer can be forced to pay.

Tr., Pt. III., p. 1195.

Mr. Tift testifies to substantially the same facts and says that the local markets are controlled by local necessities and sometimes by combinations among dealers that fix the price of lumber at exceedingly high prices.

Tr., Pt. III., pp. 1200-01.

Mr. Cantrell, the representative of a company engaged in the buying and selling of lumber, says prices paid to the wholesaler do not indicate the prices received by the manufacturers, who should receive from $1 to $1.50 per thousand less than that received by the wholesaler.

Tr., Pt. I., p. 162.

LOSE IN CENTER BOOK TOO LARGE FOR FILMING

Eighth.

THE REASONABLENESS OF A PARTICULAR RATE DOES NOT DEPEND UPON WHETHER THE ENTIRE SCHEDULE OF RATES YIELDS A FAIR RETURN UPON THE INVESTMENT.

When the question presented is that rates prescribed by a State are so unreasonably low as to amount to confiscation, it is necessary to consider the entire body of rates. The Supreme Court has several times held that while particular rates may seem too low, yet if the rates applicable to the traffic as a whole afford a fair return, there is no confiscation.

On the other hand, if the particular rates afford fair compensation for the service rendered, their reasonableness is not affected even if the entire body of rates are unremunerative. The railway companies cannot be permitted to impose unreasonably high rates upon particular commodities in order to compensate for loss on other traffic, upon some of which the rates may be insufficient to produce a fair return

We repeat that the test of the reasonableness of a rate is whether it affords fair compensation for the service rendered. We insist that in this case the presumptions favor the appellees, and that it is incumbent upon the appellants to show that the rates are not compensatory. To carry this burden appellants must show the cost and value of the service, which they have utterly failed to do.

In Chicago, etc., Ry. *v.* Tompkins, 176 U. S., 167, the Court sent the case back for the reason, among others, that the Court below failed to find the cost of the service.

The appellants admit that the rates prior to the last advance afforded a profit. Their contention is that they did not yield a sufficient profit.

In the absence of proof to the contrary, a rate ad-

– POSSIBLE BLURRED PAGES

mitted to be profitable must be regarded as compensatory.

The advance was made not because the rates were considered unremunerative, but because in the search for greater revenue it was thought that the lumber traffic would bear the advance. The imposition of higher rates in order to secure revenue sprang directly from the fact that the net earnings of the Southern Railway for the preceding year had not increased in the same proportion as had the gross earnings.

Tr., Pt. II., p. 910.

This disparity in the percentage of increase was due in some measure to the fact that large sums for betterments and permanent improvements were improperly charged to operating expenses.

Tr., Pt. II., pp. 1049-50.

The contention that the entire schedule of rates should be considered was not raised by the pleadings nor presented to the court below, nor was there any evidence particularly directed thereto. The appellate court will confine its consideration to the issues raised by the pleadings and developed in the evidence.

Should the contention of the appellants be considered it cannot be sustained.

We deny that a railway company is entitled as of right to earn any given per cent. upon the value of its investment.

The public has a right to demand that no more be exacted of it than the reasonable value of the service. Carriers are not entitled to earn returns upon unwise investments, nor to earn a given per cent. upon any investment. The cost of the service and its value to the public are the supreme tests.

In Reagan *v.* Farmers' Loan and Trust Co., 154 U. S., 362, the Court said it did not wish to be understood as saying that in every case a failure to

produce some profit is conclusive that the tariff is unjust and unreasonable.

The clearest statement of this proposition is found in Covington, etc., Turnpike Co. *v.* Sandford, 164 U. S., 578, 596, 597, 41 L. Ed., 360:

"It cannot be said that a corporation operating a public highway is entitled as of right, and without reference to the interest of the public, to realize a given per cent upon its capital stock. * * * The public cannot be improperly subjected to unreasonable rates in order simply that stockholders may earn dividends. * * * If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them, which the Constitution does not require to be remedied by imposing unjust burdens on the public."

This language has been quoted in the several subsequent cases relating to the same subject, and the doctrine has been accorded unbroken approval; one of the latest of these cases being Cotting *v.* Kansas City Stock Yards Co., 185 U. S., 79.

Judge Pardee's opinion in Louisville & Nashville R. Co. *v.* Brown, 123 Fed., 946, 951, is not inconsistent. In that case the Court clearly pointed out that in any event the rates must be reasonable. It was not even intimated that a rate would be unreasonably low even though it failed to yield any per cent. of profit upon the investment. The quotation from that opinion, given in appellant's brief in the Circuit Court of Appeals, is immediately preceded by the following language:

"At present I do not think it necessary to consider exhaustively the question as to how much per cent. of net revenue based on the actual value of the railroad and equipment a railroad company is entitled to earn. I think it will be conceded that *as long as the rates are reasonable and do not unjustly discriminate* the company is entitled to earn some amount."

There is no proof in the record that the appellants are not earning a fair return upon the average value of *their investment. There is no proof that the average value of* appellant's railways will amount to as much as $33,309 a mile, on which capitalization the net earnings as calculated by the appellant *pays 6 per cent.*

The capitalization of the earnings does not represent the value of the investment. The fallacy of this assumption consists in the fact that as the net earnings increase the assumed capitalization would correspondingly be increased, so that the net earnings could never exceed the rate per cent. which forms the basis of the calculation.

Other elements must be considered in order to arrive at value. Among other things, it is important to know the cost of the property and the amount for which it could be reproduced, as well as the value of the franchises. On all these points the record is silent.

We do know that the material prosperity of the railway companies has enormously increased within recent years. We know that in 1897 the Southern Railway paid a dividend of 1 per cent. on $54,300,000 of preferred stock, while in 1903 it paid 7½ per cent. on $60,000,000 of preferred stock and had left more than $2,000,000 surplus. We know that the Louisville & Nashville Railway Company in 1899 declared a dividend of 3½ per cent. on approximately $55,000,000 of common stock, and in 1903 paid a dividend of 5 per cent. on $60,000,000, having in addition thereto a surplus of nearly $3,000,000.

Tr., Pt. II., p. 1039.

We also know that in January, 1898, Louisville & Nashville common stock was selling for 56 3/4 (Tr., Pt. II., p. 792), while in January, 1903, the quotation was 128 3/4. When it is remembered that these companies have each a very large funded debt and heavy fixed charges, and when it is remembered that a large per-

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centage of the earnings are diverted to permanent improvement, it would seem that the companies are at least enjoying a fair return. Similar figures might be presented as to each of the other companies, excepting the Macon & Birmingham, which has always been an unwise investment and which crept in as a party defendant to this case by mere inadvertence.

Ninth.

THE OPINION OF EXPERTS IS NOT CONTROLLING AS TO THE REASONABLENESS OF RATES; AND PARTICULARLY IS THIS TRUE WHEN THE EXPERTS ARE THE PARTIES IN INTEREST WHO MADE THE RATES.

In this case the only expert witnesses in behalf of appellants were their traffic officials who were concerned in making the rates and interested in their maintenance.

If the opinions of such traffic officials are to control, then no rate could be found to be unreasonable, as it is not to be expected that those who make rates will declare them to be other than reasonable.

An analysis of the testimony of these officials will show that they base their opinion that the rates are reasonable upon the fact that under them a movement was permitted; in other words, they consider any rate reasonable that the traffic will bear.

If expert opinions are to be relied on, the appellants should have called witnesses who are not directly interested.

Even had disinterested experts testified, their opinions would have been only opinions which could not stand in the face of the facts of the case and of the findings of the expert tribunal created by law to determine the question of reasonableness.

E. T. V. & G. R. Co. *v.* Interstate Com. Com., 99 Fed., 64.

NG – POSSIBLE BLURRED PAGES

Tenth.

THE ADVANCE WAS NOT JUSTIFIED BY A CHANGE IN COMPETITIVE CONDITIONS.

The rates from Georgia points to Ohio River crossings are predicated upon groups or rate bases, varying from 1 to 7 cents per hundred pounds, while all points in Arkansas, Louisiana, Mississippi and a part of Alabama, take the same rate, known as a blanket rate or flat rate.

Tr., Pt. II., p. 1023.

This blanket rate from Southwestern points to Cairo is 16 cents, while the average rate from Georgia points is 19½ cents, or 3½ cents higher than the rate from the States above named. Under the rate prior to the last advance the average from Georgia points to Cairo was 17½ cents, while the blanket rate from the southwest was 14 cents. It is, therefore, not true that Georgia lumber could reach Cairo at the same rate as that obtaining from Arkansas and the other States named. Even the last advance of 2 cents by the Arkansas lines would not have brought that rate up to the average Georgia rate by 1½ cents.

It is to be observed that any change in competitive conditions was not brought about by the Arkansas lines, but was invited by the lines serving Georgia and the southeast. The evidence makes it clear that the movement for an advance in rate originated with the Southern Railway in its search for greater revenue to meet the increased operating expenses. Mr. Powell communicated with the Illinois Central and also communicated with members of the Southeastern Freight Association on this subject. The result was a conference in St. Augustine when the traffic officials there gathered concurred with Mr. Powell that lumber would bear an increase in rates. Up to this time there is no

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hint or suggestion that the Western lines contemplated any advance in the lumber rates. The St. Augustine meeting was followed by a conference held in New Orleans, when the matter of the advance seems to have taken definite shape, for five days thereafter the Southern Railway made its declaration. A few days before the declaration of the Southern Railway on February 4th, the representatives of the lines in conference at St. Louis announced an increase in rate from Arkansas.

Tr., Pt. II., pp. 910-11-12.

The facts of the case make it very plain that any change in competitive conditions was deliberately brought about by the Southern Railway and other southeastern lines in order to increase their revenue, and not in order to meet a Western rate which then had no existence. In fact, there was no change in competitive conditions. Before the rates from the southeast could be advanced it was necessary to have an understanding with all of the principal lines serving both the southeast and the southwest, and arrive at a tacit agreement that the rates from all points affected should be increased in the same amount and at the same time.

It is both good law and common justice that parties may not take advantage of a situation created by their own voluntary acts.

Eleventh.

THE LAST ADVANCE CANNOT BE JUSTIFIED AS A RESTORATION OF A FORMER RATE.

Prior to 1891 the rate on lumber in box cars was 3 cents higher than in flat cars. On November 28,

G – POSSIBLE BLURRED PAGES

1891, this difference was abolished. At that time the rate from Southern Railway Group No. 2 to Cairo was made 17 cents. The differential against flat cars was abolished and the rate was reduced because under the rates and differential previously existing there was no movement of lumber from the southeast to or through the Cairo gateway. There must have been such a movement through Cincinnati, as that 20-cent rate was not reduced nor has it since been ever reduced. Neither was there any change at the time in the 20-cent rate to Evansville and Louisville. The Cairo rate of 17 cents was still prohibitive and remained practically so until May 17, 1894, when it was reduced to 13 cents. The testimony of the traffic officials is that the reduction in 1891 and subsequent reductions were experimental until a point was reached on the basis of the 13-cent rate when a substantial movement was attracted. At that time, on May 17, 1894, the rates from Southern Railway Group No 2 were:

To Cairo.....13 cents.
To Evansville.....19 cents.
To Louisville.....18 cents.
To Cincinnati.....21 cents.

The average of the rates then reduced was from Southern Railway Group No. 2 to the several Ohio River crossings 17.75 cents.

This represented a reduction since 1891 of 4 cents in the Cairo rate, 2 cents in the Louisville rate, 1 cent in the Evansville rate and an increase of 1 cent in the Cincinnati rate.

The rates in force November 28, 1891, from Southern Railway Group No. 2 were:

To Cairo..... 17 cents.
To Evansville..... 20 cents.
To Louisville..... 20 cents.
To Cincinnati..... 20 cents.
An average of 19.25 cents.

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Under the last advance the rates from Southern Railway Group No. 2 are:

To Cairo	16 cents.
To Evansville	22 cents.
To Louisville	21 cents.
To Cincinnati	23 cents.

An average of 20 1/2 cents.

The present rates, including the last advance to Ohio River Crossings, therefore average 2.75 cents higher than in 1894, and 1.25 higher than in 1891.

Tr., Pt. II., p. 1026.

It is true that the Cairo rate is less than in 1891; but the Louisville rate is 1 cent higher, the Evansville rate 2 cents higher, and the Cincinnati rate 3 cents higher. There was no movement to or through Cairo under the old rate of 17 cents. There was a movement to and through Cincinnati on the 20 cent rate. If the carriers are to be permitted to restore the Cairo rate to what it was in 1891, then it is only fair to demand that the rates to Evansville, Louisville and Cincinnati be also restored by making the necessary reduction.

The right to restore a former rate, if such right exists, does not include the right to make any rate so great as to be unreasonable and unjust. The undisputed truth is that the Cairo rate prior to 1894 was practically prohibitive and therefore unreasonable. It cannot be said that an unreasonable rate may rightly be restored simply because it once existed as a paper rate.

The learned counsel for appellants predicates his right to restore the old rate upon the expression of the Interstate Commerce Commission *In re* Proposed Advances in Freight Rates, 9 I. C. Rep., 386. That expression was as follows: "Where reductions have been made by reason of commercial depression it is difficult to see why corresponding advance may not with propriety occur when that depression is

NG – POSSIBLE BLURRED PAGES

relieved." It is not claimed that any commercial depression existed in 1891 at the time of the first reduction. The subsequent reductions in 1893 and 1894 were made in order that a movement of Georgia lumber might be permitted through the Cairo gateway. This is illustrated by the fact that neither in 1893 nor in 1894 was there any reduction in the rates to other Ohio River points. However, in 1894 the rate to Cincinnati was actually increased. Appellants claim that the Cairo rate was reduced in order to meet competition from Arkansas, and they nowhere claim that it was reduced because of commercial depression.

Twelfth.

THE INCREASE IN THE OPERATING EXPENSES OF THE INTERMEDIATE ROADS DOES NOT JUSTIFY THE ADVANCE.

1. The average increase in the operating expenses of the five intermediate roads as claimed by appellants, is 32.6 per cent. This includes the large amounts expended for betterments and permanent improvements.

As shown in paragraph six of this argument, the average increase in the cost of the manufacture of lumber is in excess of 40 per cent., not including the largely increased cost of timber and not including any betterments or improvements to the lumber plants.

2. The Commission did not say that the increase in operating expenses was due alone to an increased mileage. What the Commission did say was that the increase was due for the most part to the constant growth or enlargement of the business. This includes not only greater mileage and a much

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greater tonnage, but also expenditures made to accommodate the enlarged business in the matter of permanent improvements, locomotives, cars and betterments.

3. According to the statement made by appellant's counsel the percentage of net earnings to gross earnings has decreased since 1899. It is none the less true as shown by that statement that both net and gross earnings have materially increased. It cannot be shown that the cost of the service of transportation has increased; on the other hand, we think we have demonstrated that such cost has decreased. The necessary conclusion then is that the increase in operating expenses is due to other items improperly included therein, such as expenditures for rights of way, station grounds, real estate, station buildings, shops, round-houses, grain elevators, storage warehouses, docks, wharves, and for an abnormally large increase in the number of locomotives and cars of all kinds.

Tr., Pt. II., p. 1037.

Thirteenth.

THE FACT THAT THE INTERMEDIATE ROADS ACCEPT A SMALL PROPORTION OF THE THROUGH RATE DOES NOT JUSTIFY AN ADVANCE FOR THEIR BENEFIT.

1. The question before the Commission and before the Court was whether the advance in the through rate was reasonable and just. Neither the Commission nor the Court undertook to determine the reasonableness of the proportions of the through rate. The Commission very properly said that if the allowances to the originating roads are unreasonably large, as they appear to be from a distance standpoint, and result in unreasonably low

ING – POSSIBLE BLURRED PAGES

proportions to the intermediate roads, this cannot be remedied by an advance in the total through rates charged to the public.

Tr., Pt. II., p. 1054.

We submit that the Commission was merely considering the argument advanced in behalf of the intermediate roads relating to the rate per ton per mile received by them. The Commission very properly said that if such an evil existed it could not be remedied by an advance in the through rate.

2. The proportions of the intermediate roads are accepted by them because they are considered remunerative. During the examination of Mr. Compton, Commissioner Prouty said that Georgia shippers are not interested in the question as to how the rates are divided, but in the total amount they pay to get lumber to destination. To this Mr. Compton replied: "That is the contention I am making" (Tr., Pt. II., p. 676). On page 502 of the Transcript the Chairman of the Commission asked Mr. Culp, of the Southern Railway, if his line is in a situation to determine or control or limit the allowance made to the originating road out of the through rate, to which Mr. Culp replied. "We have, of course, power to say how much we will pay from the junction point on any lumber that passes over our road. We can do that and then give them a certain amount and the remainder must be the proportion allowed beyond." The Chairman: "Are you in a position to say to a given road, to an originating road, 'We won't allow you what you have been getting out of this rate. We insist on your accepting less on this through rate than you are getting'; are you in a position to say that?" Mr. Culp: "We have the power to do it." Mr. Culp explained that if the Southern Railway should exercise this power, and the originating road be not satisfied with the proportion allowed it, such road would divert the traffic if it

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could get a greater proportion for the same service from some other connection, since its effort naturally would be to send the traffic to destination by those routes which would pay more for the business. We contend that these facts show that the proportions allowed and accepted are the result of agreements among the carriers. If all of the interested lines can so readily agree in advancing rates and in other matters which affect their interests, it is to be presumed that they can and do agree upon satisfactory divisions of a through rate.

Respectfully submitted,

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NG – POSSIBLE BLURRED PAGES